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Chapter One

Introduction and Context

Recent research reveals that South Africa continues to be a country of notable inequalities with an astounding wealth gap and vast disparities in terms of access to services such as health, education and basic amenities.¹ While the Constitution secures in law the rights of all to a dignified and secure existence, it is our collective task to work on how this can be made a reality for the average South African. Using the pieces provided by the Constitution we are called to keep working on the puzzle. An important piece in that puzzle is the question of land rights, in particular the legal mechanisms that are adopted to ensure secure tenure for all. The impact of the incomplete fulfilment of the Constitutional promise of secure land tenure informs the reality of South Africans in both urban and rural settings. However, it is the particular challenges that the laws, bills and policies present for women living in rural communities located in the former homelands that I wish to engage with here.²

Although the former homelands have been re-incorporated into a unified South Africa they are still areas of entrenched poverty.³ Many communities are still struggling with a lack of job opportunities and are reliant on over-stretched and often inadequately resourced hospitals, schools and courts. This makes access to many basic services difficult and accentuates their most dire living circumstances. Many of these areas have a history of migrant labour as the homelands were historically designed to provide the labour force for most of white South Africa. This legacy lingers and today men and women from provinces like the Eastern Cape and KwaZulu Natal continue to leave for periods to work in Gauteng, in the mines in the

¹ OXFAM Report '*Even it Up: Time to end extreme inequality*' (October 2014) available at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/cr-even-it-up-extreme-inequality-291014-en.pdf accessed on 4 November 2017 and Caelainn Barr 'Inequality index: where are the world's most unequal countries?' 26 April 2017 *The Guardian* available at: <https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries> accessed on: 4 November 2017.

² Under the Apartheid government South Africa was divided into ten 'homelands' or 'bantustans' for natives these were: Transkei, Bophuthatswana, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa. Under the post-apartheid government these were re-incorporated into South Africa and the boundaries of the new South Africa were drawn. The country has 9 provinces of those the following encompass the areas of the former homelands: Eastern Cape, KwaZulu Natal, Mpumalanga, North West, Free State and Limpopo.

³ Michael Noble and Gemma Wright 'Using Indicators of Multiple Deprivation to Demonstrate the Spatial Legacy of Apartheid in South Africa' (2013) 112 *Social Indicators Research* 187 at 187-201.

North West or on farms in the Western Cape.⁴ South Africans living in the rural areas constitute roughly 35 per cent of the population and of that number the majority are women.⁵ Currently many rural South African communities have no real security of tenure and no strong legal protection for their land rights held under customary systems. These people live in areas that continue to feel most keenly the legacy of colonialism and apartheid. This context of poverty and inequality places particular significance on secure land rights and makes it important to protect women's land rights in a meaningful way.⁶

Given this context, and in thinking about how to improve the position of rural women I am prompted to ask the following research question: what might the way in which women in Cata/ Rabula are framing their claims to residential land tell law makers about how to approach security of tenure? The starting point of this research question is that, in the past, the use of the law as a tool for framing land rights has not had positive outcomes for black South Africans, especially for black women. In order to move forward we need to acknowledge this and consciously break from it. The state has done the task of acknowledging this history, but needs to continue to work on consciously breaking from the past by ensuring that its laws do not replicate past approaches. Under Western law the land rights of black South Africans were framed in terms that sought to present them as rights that carried less stature than recognised common law ownership. This diminished status allowed for, and in some cases legitimised, the dispossession of indigenous communities. This particular framing, influenced by and coupled with the development of a rule-centric, patriarchal body of 'official' customary law facilitated the erasure of women's rights in land and the slow erosion of their security of tenure over time. Under this body of

⁴ Hilary Sapire 'Engendering Segregation: 'Black Women's Work' in the Urban American South and South Africa in the Late Nineteenth and Early Twentieth Centuries' (2000) 43 *South African Historical Journal* 39 at 49 – 53 and Statistics South Africa 'Census 2011 Provinces at a glance' (2012) at 20 available at:

http://www.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf accessed on 4 November 2017.

⁵ Statistics South Africa 'Census 2011 Provinces at a glance' (2012) at 14 available at:

http://www.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf accessed on 4 November 2017.

⁶ Ruth Meinzen-Dick and Esther Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2008) 26 *Land Use Policy* 36, Renee Giovarelli, Beatrice Wamalwa and Leslie Hannay 'Land Tenure, Property Rights and Gender: Challenges and approaches for strengthening Women's Land Tenure and Property Rights' USAID Issue Brief (July 2013).

'official' customary law women's rights to land were made dependant on the benevolence of the family patriarch.

Such developments and their impact on the status of black women found articulation in laws and rules that made these women perpetual minors. This status of minority and dependency that was ascribed to black women by those who framed their rights to land for them was related to the determinations made about the land rights of black South Africans as a whole. Similarly, continuing to assign these women, and indeed all black people, such an inferior status made it possible to frame their rights to land in ways that continued the idea of their inferiority to common law land rights. The point here is less about which came first but is rather about how doing the one – determining the content of land rights, enabled the other – assigning a class of people a particular status and vice a versa.

In grappling with my research question and in order to engage with some of the experiences of a small community of rural women who had, contrary to settled customary law, gained access to residential land in their own right, I conducted interviews in the rural villages of Cata and Rabula in the Eastern Cape. There is a narration of their personal struggles and experiences amidst broader developments in their communities in relation to women's land rights and their understanding of these developments. I spoke to these women about what prompted them to make requests for residential sites of their own, and have drawn on the interviews to understand the relationships, narratives and ideals that informed their decisions. Through their eyes and those of two members of a community governance structure, I discuss the influences these experiences have had and could have on the framing of rural women's land rights. Through the interviews with this exceptional group of women and an analysis of the existing literature I hope to tell the story of what matters to these women in being able to make and secure their claims. This selection of experiences encourages us to consider that a more nuanced understanding of these (and other) rural women's engagement with the act of framing rights could assist law and policy makers in thinking about questions of formal recognition and protection, as well as questions of social recognition and protection. There is already a body of work that discusses the value of drawing on

the experiences of members of these communities to better understand the recognition and protection of women's land rights from a bottom-up perspective.⁷

Context sensitive, nuanced understandings of how best to secure women's land rights offer a chance to develop more creative legal interventions. Such legal and policy interventions should accommodate the basis upon which claims to land are made by community members, thereby calling for a particular form(s) of legal recognition and/or protection. Nuanced legal interventions would be cognisant of the mis-fit between conceptions; they would be creative enough to accommodate layered and nested rights; and attuned to rights based on social relationships, which by their nature ebb and flow. Such legal interventions would recognise that women negotiate in these spaces in accordance with their immediate needs and considerations related to the relationships that are integral to their lives. Such interventions would depart fundamentally from the colonial and apartheid shadow. They have the potential to make real the constitutional transition for many black women in rural South Africa.

Claims to land rights framed in terms of need, birth right and notions of belonging need a certain type of power dynamic to exist in order for them to gain traction and recognition. Giving stronger rights in law to the 'traditionally' more powerful in an unequal power relationship means that law aids in propping up unequal power relationships to the disadvantaging of the weaker party. As power dynamics shift or change or spaces open up within the existing dynamics, rights claims framed in terms of underlying social relationships find space to assert themselves. Legal interventions that don't allow for the emergence of such spaces will inadvertently shut these spaces down. The emergence of such spaces matters because law is about power, it is about entrenching and protecting the existing power dynamics, which are often determined by those who hold power.

⁷ Sindiso Mnisi Weeks and Aninka Claassens 'Tensions between vernacular values that prioritise needs and State versions of Customary Law that contradict them' (2011) 22 *Stellenbosch Law Review* 823, Debbie Budlender, Sibongile Mgweba, Kettleetso Motsepe and Leilanie Williams 'Women, Land and Customary Law' Community Agency for Social Enquiry Research Report (February 2011), Aninka Claassens and Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) Ch 7.

South Africa's legal framework throughout colonialism and apartheid was a true reflection of this as it was overtly designed to entrench and protect power. The space for the emergence of claims framed by those deemed less powerful is central to balancing power, both legal and political power. It is important to acknowledge that law can either help or hinder these balancing processes. This is of particular importance where legal and political power were previously used to actively crush resistance and opposition. Legal interventions crafted in the spirit of the Constitution have the potential to hold open spaces in which the dynamics are being challenged, changed or are changing. For women in rural South Africa legal interventions have the potential to assist in holding open those spaces in which women's voices can be heard. The task of mitigating and balancing power also recognises that laws and policies may need to look different and re-conceptualise some of their fundamental concepts in order to begin offering better interventions.

An emphasis on a bottom-up approach has many advantages, one of which is that it highlights that in communities that follow customary systems of land tenure there is a more nuanced story to be told about the relationship between the individual and the collective. Understanding that customary tenure systems allow for something more delicate than just merely a choice between one or the other is deeply relevant to securing land rights in a way that honours lived experiences. The centrality of relationships here tells a story that challenges the notion that rights are only ever individualistic. Conceptions of rights that view them as relational help to tell that story and give us another way of thinking that could better equip law to accommodate the needs of rural women.⁸ Engaging with existing and proposed land tenure related legislative interventions with the centrality of relationships in mind advances our engagement with law as a tool for regulating human relations and what that means in a post-apartheid South Africa.

This dissertation unfolds as follows. The introductory chapter is followed by Chapter Two, the literature review, which discusses existing scholarship in a way that does two things. The first is to centralise the role of framing and status of women's experiences and struggles in relation to land rights and security. The second is to

⁸ Aninka Claassens and Sindiso Mnisi Weeks 'Rural Women Redefining Land Rights in the context of Living Customary Law' (2009) 25 *South African Journal of Human Rights* 491 at 498.

illustrate that for as long as engagements with framing and status in the present purposefully or inadvertently replicate aspects of the past, they will continue to be inadequate in recognising and protecting rural women's land rights. Chapter Three details the methodology that I used in conducting interviews with ten women in Cata and Rabula, who had gained access to residential land in their own names, and engages with some of the challenges of small-scale empirical work. In Chapter Four, which provides an overview of the relevant and significant legal and policy interventions both old and new, I engage with the role of framing and the assigning of status as reflected in the legal instruments. It is the implications of who does the framing and why they frame the land rights of some in a particular way, as well as the interplay between such framings and status that I try to make explicit in my discussions of the laws.

Alongside the discussions of past framings, I also present a discussion of present framings and the message that such conceptualisations send about status. This discussion of framing and status in the present is explored on two levels, through the laws and through lived experience. The first level is fleshed out in Chapter Four and is discussed through the laws and policy drafted by the state as represented by the Department of Rural Development and Land Reform, the body responsible for the drafting of land-related laws and policies. In Chapter Five, the second level is explored through an engagement with the experiences of a select group of women living in the rural communities as reflected in the interviews conducted. These two chapters are drawn together in Chapter Six where the intention is to juxtapose the framings and messaging around status from the department, alongside that of women living in the rural Eastern Cape. Chapter Seven contains my concluding remarks and makes the overall point that a top-down approach to the framing of women's claims to land rights has negative consequences for women.

The manner in which rights to land are framed (and by whom they are framed) matters. For black women in colonial and apartheid South Africa the conceptualisation of customary land rights as 'less than' intersects with the manipulation of their status. Women in these communities lived in spaces where particular framings and assigned status were brought together. The result is an important part of South Africa's land history and so must also be an important part of attempts to redress that history.

Chapter Two

Literature Review – The Framing and Status Story

Introduction

This chapter discusses the literature of the manner in which customary law was shaped and constructed through the colonial and apartheid era. Specifically, this literature review includes works on the history of how land rights held under systems of customary law were engaged with and interpreted. The discussion also includes literature dealing with the nature of communal tenure and the land rights of single women as understood from within these communities and articulated through work with an ethnographic slant. In order to show how my research question seeks to foreground alternative framings of claims I include these bodies of literature with the intention of tracing the approaches to framing land rights in order to better understand the significance of framing. I especially want to highlight the significance of framing through the eyes and experiences of a small group of single women living in a rural community.

The history of land injustice that informs South Africa's past and present has multiple threads that weaved together to create the fabric of our democratic dispensation. The two, closely related, threads that I engage with in this dissertation are framing and status. When I speak about framing I am referring to the manner in which land rights and the accompanying relations are conceptualised and understood. In law, framing is done through a variety of means, including legislation, which is my focus. I consider framing to be integral to legibility, by which I mean the ability of a system to recognise and read certain values and rights, and therefore of importance when it comes to protection. Framing is also intimately linked to power. It is about who has the power to give content to rights and the power or privilege that certain framings bestow on or take away from rights holders. There is also the ever-present question of whose conceptualisation of land rights should take precedence. These questions are of particular importance for rural women as a 'vulnerable group'. In a context where power dynamics are frequently skewed to favour others over rural women the relationship between power and framing must be foregrounded. The particular positioning of women living in rural communities that subscribe to systems of customary law also foregrounds the second thread, status. By status I mean an

individual's social and legal standing. Their ability to feel that they can freely enjoy their rights and participate fully in family affairs and community life.

In this chapter I engage with the literature that discusses the history of distortion and misinterpretation that has shaped the conceptualisation of land rights held in terms of systems of customary law. I then go on to look at writing that shows the misalignment between commonly held understandings of common law ownership and systems of customary tenure and the role that this played in undermining customary land rights. In discussing status and land rights I draw on work that outlines the status assigned to women under 'official' customary law. This body of literature is juxtaposed with ethnographic sources that present a view from within traditional communities.

Distortion – a key part of the framing story

The distorting fallacies and inaccurate understandings used to describe land rights held in terms of systems of customary law are an integral part of South Africa's history. That history informs current challenges in protecting and advancing land rights. It is evident that the historical dispossession of black communities involved the actual loss of land. This physical taking was accompanied and enabled by the act of stripping black people of land rights in practice and in law. In order to do this, the colonial and apartheid states crystallised in law their assumptions and understandings of customary tenure systems and rights. As is shown in the discussion of the literature, the outcome of the crystallisation of these assumptions illustrates the significance of racist, top-down framing in people's experiences of land dispossession and the erasure of their land rights.⁹

Okoth-Ogendo describes the manner in which land rights held under indigenous law were subjected to certain misinformed understandings and assumptions. He points out the particular fallacies that underpinned the ambivalence that the colonial officials showed towards indigenous land rights, including that indigenous law does not

⁹ HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) Ch 4, Tom Bennett 'Official' vs 'living' customary law: dilemmas of description and recognition' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) Ch 6, TW Bennett *Customary Law in South Africa* (2008) 371 – 399.

confer property rights.¹⁰ This was based on an understanding that property rights could only exist where there were exclusive rights of use and control; relying on the notion that customary communities used and controlled land communally thus precluding the existence of property rights.¹¹ Okoth-Ogendo goes on to expand on how this flawed understanding also spurred on the imposition of a foreign regime of property law to fill the perceived gap in indigenous law.¹² He argues that colonial officials asserted that because land was used communally only mere privileges not rights were conferred, thus justifying the declaration of land as vacant and ownerless. Further fallacies identified by Okoth-Ogendo include that title to land could only be vested in the colonial sovereign and that indigenous communities had no legal persona. This meant that the indigenous communities living on that land were relegated to the status of perpetual tenants and in turn placed considerable power in the hands of the state to allocate land rights in accordance with an imposed property law regime.¹³

Bennett describes the manner in which colonial courts engaged with customary law, observing that rather than change their procedures the courts opted to change customary law instead.¹⁴ This response to customary law was determined in part by the fact that colonial officials and authors understood and viewed what they encountered in African systems through the lens of the European legal framework in which they had been trained and with which they were familiar.¹⁵ This approach worked to the disadvantage of customary systems, including tenure systems, as it often meant that central features of the customary systems were overlooked or regarded as merely convention.¹⁶ Through processes of codification and restatement, colonial officials wrote into law what they determined to be the 'rules' of customary law, which they selected from the customs and practices of communities. Thereby they created a single system of customary law and shaped a particular

¹⁰ Okoth-Ogendo note 9 above at 96.

¹¹ AJ Van der Walt 'The fragmentation of Land Rights' (1992) 8 *South African Journal of Human Rights* 431 at 431 – 435.

¹² Okoth-Ogendo note 9 above at 97.

¹³ Okoth-Ogendo note 9 above at 97.

¹⁴ Tom Bennett 'Official' vs 'living' customary law: dilemmas of description and recognition' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 140.

¹⁵ Bennett note 14 above at 141.

¹⁶ Bennett note 14 above at 141.

understanding of customary land rights and relations.¹⁷ As Bennett explains: 'colonial authors did as much to create the world they were writing about as to describe it.'¹⁸

The concept of ownership, as defined in the system from which the colonial authors and administrators drew, played an important role in creating the world they were describing. Ownership, as traditionally defined in common law, is a universal right enforceable against the world.¹⁹ It is a right held to the exclusion of all others. In the hierarchy of rights that one can have to property it is the strongest and most complete, as all other rights are subordinate to it.²⁰ It has been argued that the value of having the most complete and strongest right to a thing is influenced by the economic system alongside which a particular property regime has developed.²¹ Patterns and forms of accumulation influenced by a particular value system and world-view have shaped property systems for generations.²²

The approach to customary law adopted by colonial authorities resulted not only in a misunderstanding of customary systems, but it also meant that certain concepts and terms from the western legal framework were imposed on these customary systems.²³ For a discussion on land rights and customary law the most pertinent of these impositions is the common law concept of ownership. A particular notion of ownership is one of the most enduring assumptions and impositions that colonial officials introduced. Colonial administrators understood ownership to be constituted

¹⁷ 'Like all colonial powers, the British worked with a single model of customary authority in precolonial Africa. That model was monarchical, patriarchal and authoritarian. It presumed a king at the center of every polity, a chief on every piece of administrative ground and a patriarch in every homestead or kraal.' Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (1996) 39 and Martin Chanock *The Making of South African Legal Culture 1902 – 1936 Fear, Favour and Prejudice* (2001) 243 – 260.

¹⁸ Bennett note 14 above at 141.

¹⁹ Du Bois F (ed) *Wille's Principles of South African Law* 9 ed (2007) 470 defines ownership as: 'Ownership...is potentially the most extensive private right that a person can have with regard to property. In principle, ownership entitles the owner to deal with his or her property as he or she pleases within the limits set by the law.' See also: AJ Kerr The Legal Position of the Individual in non-statutory Customary Law in *The Customary Law of Immovable Property and of Succession* 3 ed (1990).

²⁰ TW Bennett *Customary Law in South Africa* (2008) 375 – 'One of the distinctive features of ownership is its "absoluteness", a quality that implies the concentration of all entitlements in one person, who, in consequence is free to use and dispose of the property at will...whereas ownership implies a collection of interests vesting in a single holder.'

²¹ Bennett note 20 above at 375

²² *Wille's Principles of South African Law* 9 ed (2007) 406.

²³ HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) Ch 4, TW Bennett *Customary Law in South Africa* (2008) 374.

by individually exercised and exclusively held rights over land.²⁴ Upon encountering African systems of tenure they looked for examples of ownership, as they understood it, and when they did not see these they assumed that these societies had no conception of ownership.²⁵ This absence was explained through the use of descriptors like: 'primitive', 'uncivilised', and 'communal' – another enduring term.

That ownership was considered foreign to customary tenure systems is important for understanding the history of dispossession and is perhaps best served by asking two questions. The first question is related to the meaning of ownership: what assumptions and ways of engaging with the world underpin ownership and property rights? The second question is: what is to be gained by denying the existence of ownership within systems of customary tenure?

Pointing us to an answer to the first question, Bennett articulates a point that strikes at the heart of the issue. He suggests that a theory of land tenure needs to explain more than just the basis upon which tenure is granted. A theory of tenure needs to explain why others should not disturb the holder's possession. It is in this explanation that the underlying assumptions and world views are to be found.

A developed theory of land tenure, however, must go much further to explain, not merely the desire for certain things, but also why other people, with similar desires, should leave the holder in undisturbed possession.²⁶

Ownership as part of 'a developed theory of land tenure' is underpinned by notions of completeness and superiority, which explain why the possession of the holder should not be disturbed. It is this type of rationale for 'undisturbed possession' that we invoke when we use the term to configure land rights. Scholars point out that imposing such a rationale onto a land tenure system has negative consequences, not least of which is that it obscures other rationales for peaceful possession that

²⁴ Bennett note 20 above at 374.

²⁵ John C. Weaver 'The Construction of property rights on imperial frontiers: the case of the New Zealand Native Land Purchase Ordinance of 1846' in Diane Kirby and Catharine Coleborne (eds) *Law, history, colonialism: The reach of empire* (2001) 221 – 224.

²⁶ Bennett note 20 above at 377

may already exist within that system.²⁷ Rather, what is required is a reconfiguration or a change in conceptions of ownership.²⁸

It should also be noted that property scholars are also engaged in conversations that seek to better understand what constitutes property, including understanding property rights as 'a bundle of sticks/rights' as opposed to one whole.²⁹ John Sprankling explains that property is generally defined as 'rights among people that concern things.'³⁰ In acknowledgment of this formulation, property is commonly described as a bundle of rights, in which the sticks in the bundle are labelled 'according to the nature of the right involved.'³¹ Being conscious of the underlying meanings and contested understandings that comes with terms like ownership and property is a necessary part of the present-day conversation about land rights.

The second question is what was to be gained by denying the existence of ownership in customary systems? This requires an exploration of what the denial of ownership under customary tenure facilitated and whose interests it served. Declaring ownership foreign to customary tenure systems still meant that people's relationships to land needed to be described. The thinking that the language of ownership could not be used provided space for the use of the term 'communal tenure' to describe customary tenure. This term was introduced in order to describe customary tenure but also to navigate the peculiarities of customary tenure systems.³² The use of 'communal' in reference to these systems of land holding has been described as misleading and at times inaccurate as the term obscures the more complex nature of land rights within customary tenure systems.³³ This is because describing these as systems of 'communal tenure' continues the idiom that customary tenure systems do not confer strong individual rights. The resultant effect

²⁷ AJ Kerr warns that "One must guard against the danger of assuming that a term used to describe a right in one system of law can only be used in another system if all the incidents of the right in the first system are to be found in the second." *The Customary Law of Immovable Property and of Succession* 3rd edition (1990) 62.

²⁸ AJ Van der Walt 'The fragmentation of Land Rights' (1992) 8 *South African Journal of Human Rights* 431.

²⁹ John G. Sprankling *Understanding Property Law* (1999) Ch 1.

³⁰ Sprankling note 29 above at 4 – 5.

³¹ Sprankling note 29 above at 5.

³² Bennett note 20 above at 377.

³³ Bennett note 20 above at 377 – 379, Ben Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Act* (2008) Ch 5.

is that the idea that communal tenure must, by definition, preclude ownership or individual rights is cemented into law and into the ideological framing of black people's relationship to land. The inaccuracy and inappropriateness of considering customary land rights as only held collectively is further clarified in the work of Alistair Kerr who points out that certain rights in these customary tenure systems are akin to ownership.³⁴ As the literature shows, there is a balance and accommodation of interests and rights within customary tenure systems that is obscured by the use of terminology that encourages us to think of land rights in binaries of absolute rights versus incomplete rights.³⁵

Locking customary tenure systems into the language of 'communal' and out of the language of individual rights and ownership not only did these tenure systems a disservice, but it also facilitated and advanced the interests of the government of the day. In his discussions of customary tenure, Bennett describes how misconceptions about the presence or absence of ownership used by the colonial government to interpret and engage with customary tenure justified the dispossession of African societies.³⁶ He explains that '[i]f primitive society did not know ownership but only precarious possession, colonial governments were free to expropriate African land on the basis that it was 'unowned'.'³⁷ There could effectively be no dispossession if indigenous law conferred no exclusive property rights and likewise there could be no dispossession in societies not civilised enough to have a developed notion of ownership. Through mere characterisation, the land rights of many African communities were undermined, thereby virtually erasing them from the matrix of land administration applied in South Africa.

The most notable means through which the erasure of customary land rights was carried out was the Natives Land Act 27 of 1913. This law consolidated practices and policies that had been in operation in the various colonies and later in the Boer

³⁴ "The right to use and enjoyment of allotted land vests in non-statutory customary law in the individual not the chief...the individual has the most extensive right in private law. He, therefore, is the "owner"." AJ Kerr *The Customary Law of Immovable Property and of Succession* 3rd edition (1990) 61 – 62.

³⁵ The nature of this balance is elaborated on further into this chapter. See also: Ben Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Act* (2008) Ch 5.

³⁶ Bennett note 20 above at 376.

³⁷ Bennett note 20 above at 376.

Republics. In his oft-quoted description of the impact of the Natives Land Act, Sol Plaatje encapsulates the status ascribed to black South Africans through this Act '[a]waking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth.'³⁸ Plaatje goes on to describe how the Act kept black South Africans from being able to own land, even within the portions set aside for them, thereby continuing their exclusion from the model of exclusive ownership.

They are the Native Locations which were reserved for the exclusive use of certain native clans. They are inalienable and cannot be bought or sold, yet the Act says that in these "Scheduled Native Areas" Natives only may buy land. The areas being inalienable, not even members of the clans, for whose benefit the locations are held in trust, can buy land therein...as long as the clans of the location remain loyal to the Government, nobody can buy any land within these areas. Under the respective charters of these areas, not even a member of the clan can get a separate title as owner in an area — let alone a native outsider...³⁹

The experiences of black South Africans under the Natives Land Act of 1913 were not improved by the introduction of the accompanying Natives Trust and Land Act 18 of 1936. As iNkosi Albert Luthuli describes in his autobiography, this Act merely built on the foundation laid by the 1913 Act and continued the confinement of a portion of the population to a small slice of the land.

The Natives Land and Trust Act did not substantially alter the land position. It merely consolidated the practices which had existed from 1913 onwards in one piece of legislation, confining us more effectively to our thirteen per cent of South Africa's land surface...Thus we still live on less than thirteen per cent of South Africa's land; and the present government is finding it acutely difficult to persuade white farmers to part with any more.⁴⁰

Writing about the processes of dispossession, displacement and forced resettlement that accompanied these restrictive land laws, Nkosi Luthuli describes the devastating

³⁸ Sol Plaatje *Native Life in South Africa* (2007) 21.

³⁹ Plaatje note 38 above at 23.

⁴⁰ Albert Luthuli *Let my people go* (2006) 84.

manner in which the lives of black South Africans were manipulated. This is a reality made possible, in part, through a particular framing in law of the land rights of black South Africans.

...but for Africans our country has been made into a vast series of displaced persons' camps. Individuals are shuttled around. They are taken suddenly out of urban areas and dumped in reserves where the chiefs do not know them and the ancestral lands have long since gone. Whole towns of thousands of people – the example of Sophiatown is well known – are lifted up and thrown down elsewhere, minus freehold rights...Individuals, townships, villages, whole tribes are picked up and put down elsewhere...⁴¹

The framing of black land rights by those from outside these communities acted to serve two purposes: to enable their dispossession and to justify such dispossession. If the land rights held by blacks were treated as illegible by the dominant common law system, they could effectively be overridden and ignored. If the systems of tenure and land holding that operated within customary communities were reinterpreted in order to align them with a western model, then administrators and politicians could justify their acts by claiming that they were in accordance with the customs and tenure systems of black people. For all intents and purposes framing was used as a key tool in the governance of this portion of the population.

Alternative Framings: framing from within

As the preceding discussion shows, colonial and apartheid interpretations and definitions of customary law determined that under these systems of law land was only held collectively. In order to further illustrate the extent of this misconception it is useful to consider the nature of communal tenure in African societies as understood through ethnographic work.⁴² Writing about communal land tenure systems in South Africa, Ben Cousins describes the broad character of communal land tenure as follows:

⁴¹ Luthuli note 40 above at 194.

⁴² Monica Hunter *Reaction to Conquest: effects of contact with Europeans on the Pondo of South Africa* 2 ed (1961) 112 and Jack Simons *African Women Their Legal Status in South Africa* (1968) 261.

The exercise of any right was always limited by obligations and counterbalanced by the rights and privileges of others. Individual security was great, provided that the necessary respect for the ethical code of the group was maintained... Often a number of social personalities exercised rights and claims in the same piece of land. Land tenure was both “communal” and “individual”, and can be seen as a “system of complementary interests held simultaneously”.⁴³

Conducting research in the Keiskammahoek area of the Eastern Cape in the 1950s, Mills and Wilson identify the essence of communal tenure as: members of a group holding shared rights in certain portions of land, like the commonage.⁴⁴ Other portions are ‘allocated to individuals to cultivate, and over which they have exclusive rights, for so long as they are domiciled in the village.’⁴⁵ These communal systems of tenure are centred on balancing simultaneously held complementary interests in land.⁴⁶ In certain instances the interests accrue to an individual who enjoys strong protection against interference that is balanced by social obligations.⁴⁷ Communal tenure systems place importance on an ‘indigenous land ethic’, the principles of which ‘offer a basis for either common property rights or different forms of individual property rights under community supervision.’⁴⁸ As Cousins notes:

Contemporary South African case studies generally characterise land tenure in the former reserves as being simultaneously “communal” and “individual” in character. Secure rights to land and natural resources derive largely from recognised and accepted membership of a local group or “community”. Membership flows from birth in the first instance, but outsiders who apply for land can be accepted into the community through defined procedures... Land rights, as in the pre-colonial era, are closely inter-related with social and cultural relationships more generally and the identities associated with these. People often view land rights as underpinning the continuity of social units as

⁴³ Ben Cousins ‘Characterising ‘communal’ tenure: nested systems and flexible boundaries’ in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Act* (2008) 111 and TW Bennett *Customary Law in South Africa* (2008) 381.

⁴⁴ M. E. Elton Mills and Monica Wilson *Keiskammhoek Rural Survey* (1952) Volume 4, Chapter 2.

⁴⁵ Mills and Wilson note 44 above at 8.

⁴⁶ TW Bennett *Customary Law in South Africa* (2008) 381.

⁴⁷ Isaac Schapera *A Handbook of Tswana Law and Custom* (1955) 199.

⁴⁸ Catherine Cross ‘An alternate legality: the property rights question in relation to South African land reform’ (1992) 8 (3) *South African Journal of Human Rights* 305 at 314 -317.

well as securing access to the basic conditions of human existence. Tenure security derives in large part from locally legitimate landholding rather than law.⁴⁹

It is apparent from these descriptions that to think of communal tenure as wholly collective is inaccurate and overlooks a number of principles that underpin this form of tenure. Holding land collectively and with shared rights stems from an individual's role as a recognised member of the collective. However communal land tenure systems also acknowledge the individual and ensure security for individual rights. There are finely balanced relationships of reciprocity at play when it comes to communal tenure. The articulations of land tenure in post-apartheid South Africa draw on these more nuanced and complex understandings of communal tenure and communities continue to describe and frame their tenure in terms that reflect both collective and individual land holding.

Misalignment – where the inside framing and the outside framing meet

The literature discussed above draws out the different interpretations of tenure in African societies. The narrow, exclusionary framing of the colonial and apartheid states that allowed for dispossession and erasure is placed alongside framings that foreground the more nuanced nature of communal tenure within African systems. Having looked at what are effectively opposite ends of the spectrum. But what happens at the point where the two meet? That is, what happens where state (or outsider) interpretations – with all of their legacies – meet the interpretations of the people who live these systems? The literature suggests that it results in the development of an alternative approach that exists in the shadows.

Rosalie Kingwill's work with freeholders in the Eastern Cape and her exploration of family tenure presents an example of the types of difficulties that can arise when the inside framing meets the outside framing.⁵⁰

⁴⁹ Ben Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Act* (2008) 112 – 113.

⁵⁰ Rosalie Kingwill 'In the shadows of the cadastre: family law and custom in Rabula and Fingo Village' in Paul Hebnick and Ben Cousins (eds) *In the shadow of policy: everyday practices in South African Land and Agrarian Reform* (2013) Ch 12.

Evidence emerging from field research in South Africa indeed reveals a deep contradiction between the meaning of ownership as defined by law, and the meaning of ownership as practiced by a seemingly large proportion of South Africans of African descent.⁵¹

Her discussions of the disjuncture that occurs at this meeting point show that for freeholders in Rabula, rights are based on relationships and participation in family affairs. These sentiments are captured in her description of the language that underpins family tenure.

The language of family tenure is captured by the idea of belonging. “People *belong* to the extended family; land *belongs* to the whole family; family members *belong* to the family land. Ownership functions to maintain family bonds, promote interaction and protect the family”.⁵²

This conception of family tenure finds itself at odds with the common law approach of pre-set requirements for ownership, such as individual use and enjoyment. Kingwill notes that it is also in tension with customary law – especially official customary law – and its centralisation of the authority of the male.⁵³ This is exemplified in the approach taken in the determination of *umngcini* ‘khaya’ (the responsible person/keeper of the home) a role that is about personal attributes. The central role played by personal attributes, such as being responsible, means that often it is unmarried sisters or aunts who step into this role.⁵⁴ This pushes back against entrenched thinking about succession, which has been influenced by the ‘official’ customary law rules of succession.⁵⁵

Although Kingwill’s work is focussed on areas in which there is a history of freehold tenure, the relevance of the existence of an alternative system is not diminished. If the approach to reforming tenure security continues to be one that formalises in ways that are not cognisant of how social relationships underpin claims to land rights

⁵¹ Rosalie Kingwill ‘Lost in translation: Family title in Fingo Village, Grahamstown, Eastern Cape’ in Hanri Mostert and Thomas Bennett (eds) *Pluralism and Development: Studies in access to Property in Africa*, Mostert and Bennett (2012) 210.

⁵² Kingwill note 50 above at 166.

⁵³ Kingwill note 50 above at 165.

⁵⁴ Kingwill note 50 above at 167.

⁵⁵ Under ‘official’ customary law the rule of male primogeniture was the pre-determined rule to be applied in matters of succession for black people. This rule was rejected by the Constitutional Court in *Bhe v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para 35.

in rural South Africa, then this will have serious implications for community members' ability to relate to land in ways that reflect their practices and value systems. As the work of Kingwill shows, there is an alternative normative approach/ system that has developed and continues to develop in the 'shadow of the cadastre'.⁵⁶ While it is true that social practice will not always reflect state laws and there will often be systems that develop and operate outside of state law, this should not deter law makers from drafting inclusive legislation and policy.

The question of the appropriateness and utility of formalising land rights through law as a means of securing land rights is included in this discussion on formalisation to illustrate how formalisation can serve as an example of the misalignment that occurs where inside and outside framing meet. The surveyed literature illustrates that there are a number of countries that have opted to rely on formalisation as a strategy for securing land rights.⁵⁷ The underlying premise of this approach is that ownership is in the best interests of vulnerable groups, and that part of the challenge faced by these groups is not being able to access the 'benefits' that come with ownership.⁵⁸ Two challenges to this approach are raised and briefly discussed here. The first, unpacked above, relates to the conceptions of ownership that define the terms of formalisation and the underlying assumptions that attach to those terms. These are based on a system of property that values and protects the enforcement of exclusive ownership. Formalisation seeks to impose rigidity, and so certainty, on a system in which the 'rules' that govern land rights are in flux and are constantly negotiated.⁵⁹ The second, is that formalisation assumes that everyone is able to take advantage of the benefits that it brings. This assumption is based on the further assumption of neutrality and equality during the formalisation process, which overlooks the ways in which formalisation is often used by elites to entrench existing inequality and create

⁵⁶ 'A cadastre uses a cadastral survey or cadastral map, to develop a comprehensive [register](#) of the [real estate](#) or [real property](#)'s boundaries within a country. Many countries (including South Africa) use the cadastre to define the dimensions and location of [land parcels](#) described in legal documentation. The cadastre is relied upon as a fundamental source of data in disputes and [lawsuits](#) between landowners.'The Cadastral System in South Africa available here: <http://www.alignsurvey.co.za/the-cadastral-system-in-south-africa/> accessed on 4 November 2017

⁵⁷ Tor A. Benjaminsen, Stein Holden, Christian Lund and Espen Sjaastad 'Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa' (2008) 26 *Land Use Policy* 28.

⁵⁸ Ruth Meinzen-Dick and Esther Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2008) 26 *Land Use Policy* 36 at 38.

⁵⁹ Meinzen-Dick and Mwangi note 58 above at 38.

new inequalities.⁶⁰ In many ways standard formalisation processes, such as titling, place so much at stake that they play into the idea of 'the winner takes all'. This elicits power struggles and encourages those who are better resourced or have better access to resources, to go all out in securing the 'winning hand'.⁶¹ In this way formalisation is a double-edged sword in that it can be used to secure the rights of the vulnerable, but it also has the potential to heighten certain vulnerabilities.

Common conceptions of formalisation construct it as the shift from the 'informal' to the 'formal', from 'extra-legal to legal'.⁶² The result is that formalisation focuses on state law, state policy and the role of the state. This conception of formalisation is criticised for not taking into consideration the manner in which state law and local norms or customs exercise influence over one another.⁶³ The formulation of formalisation as progress, as advancement, as linear development, is criticised for being blind to gender dynamics and for failing to use gender as a lens through which to analyse and gauge such progress.⁶⁴ Yngstrom claims that such formulations of formalisation as progress and the 'models and the policies they generate render women's land claims, and the forms of tenure insecurity that they face, invisible.'⁶⁵ These concerns are valid, especially when one considers the impact of individual and joint titling as legal strategies to improve the position of women. Celestine Nyamu-Musembi presents research from Kenya that shows how the low numbers of husbands and wives registering the land jointly, together with the practice of registering the land in the name of the household head – who is often a male – have resulted in formalisation weakening women's claims to family property.⁶⁶

Formalisation often results in the prioritization of primary rights over secondary rights.⁶⁷ Formalisation through the registration of land rights is mainly concerned with

⁶⁰ Benjaminsen et al note 57 above at 30 – 31.

⁶¹ John W. Bruce "Simple Solutions to Complex Problems: Land Formalization as a 'Silver Bullet'" in Jan Michiel Otto and André Hoekema (eds) *Fair land governance; How to legalize land rights for rural development* (2012) 31 – 56.

⁶² Ingrid Yngstrom 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate over Land Policy and Changing Tenure Systems' (2002) 30 *Oxford Development Studies* 21.

⁶³ Yngstrom note 62 above.

⁶⁴ Yngstrom note 62 above.

⁶⁵ Yngstrom note 62 above.

⁶⁶ Celestine Nyamu-Musembi 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' (2007) 28 (8) *Third World Quarterly* 1457.

⁶⁷ Yngstrom note 62 above and Lyn Ossome 'Can the Law Secure Women's Rights to Land in Africa? Revisiting Tensions Between Culture and Commercialization' (2014) 20:1 *Feminist Economics* 155.

the exclusive rights held by an individual. This means that the only rights that can be recognised in this process are those of the principal landholder who is, in most cases, male. The rights of women are relegated to the status of 'secondary rights' and are subordinate to those of the principal landholder.⁶⁸ Susana Lasterria-Cornhiel uses Bolivia and Laos as case studies in exploring who benefits from formalisation programmes and whether in fact women who are part of such programmes fare any better than those who are not.⁶⁹ She explains that the focus of titling programmes is efficiency and technology. The result of this orientation is that complex customary practices are overlooked, leaving 'secondary' or other rights unrecognised and their holders insecure.⁷⁰ For women, in particular, formalisation often renders de facto rights and interests in the land invisible.

The work of anthropological scholars shows that under certain customary law systems both men and women's rights were legally visible.⁷¹ The problem with the prevailing conceptualisation of women's rights as 'secondary' is twofold. Firstly, labelling these rights as 'secondary' makes them subject to the holder of the primary rights. This imposes a false hierarchy on these customary systems in which rights are interdependent as opposed to wholly hierarchical. Secondly, the danger is that in this conceptualisation it is only certain rights held by women that are visible. Claassens and Ngubane point out that registering the title to family land in the name of the husband and his wife would result in the exclusion of other members of the family with rights in the land, as only the wife's rights are recognised.⁷² Securing women's land rights in this way does not take into account the family-based nature of systems of land holding. While formalisation in this instance may benefit the wife, it would exclude other women in the family. Unmarried sisters and daughters would find themselves having to assert rights rendered invisible by processes of registration and titling.

⁶⁸ Yngstrom note 62 above at 25.

⁶⁹ Susana Lasterria-Cornhiel 'Who benefits from Land Titling? Lessons from Bolivia and Laos' (2007) 132 *Gatekeeper Series* 1.

⁷⁰ Lasterria-Cornhiel note 69 above.

⁷¹ Yngstrom note 62 above, Ruth Meinzen-Dick and Esther Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2008) 26 *Land Use Policy* 36.

⁷² Aninka Claassens and Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal land Rights Act* (2008) Ch 7.

The inadvertent disempowerment of women through formalisation is deeply related to the power relations at play in the spaces where rights are negotiated and the broader power relations within the wider community. Whitehead and Tsikata describe how those who are already powerful in those spaces – traditional leaders and prominent members of society, often all men – are able to exert considerable influence over the construction of custom, thereby managing to place men in a favourable position.⁷³ Formalisation also opens up opportunities for other well-placed elites to capture the process. Those with better knowledge of the system can use it to their advantage, often at the exclusion of others.⁷⁴ It is ineffective and potentially harmful to merely implement formalisation practices, such as titling, with no consideration for the power dynamics that play out across a range of spaces. Whether based on lines drawn in terms of age, class or gender, unequal power relations persist in many communities, both urban and rural. To cast a powerful 'winning hand' formulation into these spaces may cause equal parts of healing and harm.

Imposed status – through the eyes of outsiders

I wish to engage with status and its meaning for and relationship to framing. In this discussion my focus is on status as determined by outsiders and insiders. In discussing status as determined by outsiders I am interested in how that status is and has been made real through legislation. This is contrasted with how insiders, namely women in rural communities, determine and make real their status. The status assigned to a particular group of persons influences how the land rights and relations of that group of persons are framed. Law(s) have ascribed to black women a certain status. This imposed status is intimately connected to women's land rights in the South African context. The relationship between imposed status and the disempowerment of black women is a direct one. The assignment of a particular status to this group of women from the top down was used to justify disempowering them. For example, women who are perpetual minors can be justifiably prohibited from holding land in their names.⁷⁵ These assignments of status were shrouded in

⁷³ Ann Whitehead and Dzodzi Tsikata 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary' (2003) 3 *Journal of Agrarian Change* 75.

⁷⁴ Franz von Benda-Beckmann 'Mysteries of capital or mystification of legal property?' (2003) 41 *Focaal – European Journal of Anthropology* 187.

⁷⁵ Native Administration Act 38 of 1927 section 11(3)(b).

the language of custom in order to supposedly provide them with legitimacy.⁷⁶ Land has been identified as a physical means through which status, as social standing, is represented and made manifest.⁷⁷ In the case of women, this relationship was actively disrupted through the diminishing and policing of women's status and by extension their land rights. The diminished status of women justified depriving them of access to land, thus limiting their ability to accumulate assets and thereby acquire status.⁷⁸

Mamdani writes about role of the bifurcated state in influencing status. He describes the approach of the colonial state to ruling and governing the natives.⁷⁹ He notes that the development of the bifurcated state determined that '[c]itizenship would be the privilege of the civilized; the uncivilized would be subject to all-around tutelage. They may have a modicum of civil rights, but not political rights...'.⁸⁰ The implications of this state formulation are that one group of people are assigned the status of 'citizen' and another that of 'subject' and this carries over into how the rights of each are determined.⁸¹ It is insufficient for a legal system to merely allow people to escape from an assigned status; it must also alter the framing of rights accordingly in order to avoid replicating previous mistakes and injustices. In the case of black South African women colonial and apartheid authorities assigned them the status of subjects – subject to their husbands and to the state as opposed to full rights-bearing citizens, and their rights to land were defined in accordance with that assigned status. This was done through a particular construction of 'official' customary law and brought into practice through various statutes. I now turn to discuss these legislative instruments and their influence on the status of women.

Before its repeal in 2005, the Black Administration Act 38 of 1927 (BAA) set out the governance structure for black South Africans.⁸² For women it determined that

⁷⁶ Martin Chanock *The Making of South African Legal Culture 1902 – 1936 Fear, Favour and Prejudice* (2001) 336 - 339.

⁷⁷ TW Bennett *Customary Law in South Africa* (2008) 381.

⁷⁸ Chanock note 76 above at 336 and Shamim Meer 'Introduction' in Shamim Meer (ed) *Women, Land and Authority* (1997) 1.

⁷⁹ Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (1996) 39.

⁸⁰ Mamdani note 79 above at 17.

⁸¹ Mamdani note 79 above at 16 – 19.

⁸² This Act was first introduced as the Native's Administration Act 38 of 1927. It was largely repealed by the Repeal of the Black Administration Act and Amendment of certain laws Act 28 of 2005.

women in a customary marriage were to be considered minors and placed under the authority of their husbands throughout their lives. The South African Law Reform Commission, in its report on the repeal of the BAA, explains the implications of the particular provision on the status of married women:

African women who were married by virtue of a customary union were deemed to be minors and their husbands were deemed to be their guardians. As a result, their status was that of a perpetual minor. They could therefore not enter into contracts or acquire property in their own right. Before its repeal, section 11(3)(b) of the Act provided as follows:

“A Black woman who is partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.”⁸³

The premise for this provision and particular thinking was shaped by the patriarchal idea that a woman would merely replace the authority of her father with that of her husband.⁸⁴

Writing about how the nationalist government had imposed a status of legal minority upon black women, Nkosi Luthuli alludes to the recurrent themes of misinterpretation and imposition that defined the ‘official’ customary law used to govern black South Africans.

My point here is simply this: our women have never been treated by us as inferiors. It is the whites, misunderstanding the laws and customs by which we formerly governed ourselves, who have done this. Having no ready-made laws in their own society to meet the needs of ours, *they* have declared that *our* women are legally minors, throughout their lives. This does not reflect the situation seen through African eyes, and it has done great injury to the position occupied by African women.⁸⁵

In addition to the characterisation of black women as minors, literature dealing with the process of forced removals during apartheid also illustrates the way in which the

⁸³ SA Law Reform Commission Report on the repeal of the BAA of 1927 (2003) at 23.

⁸⁴ TW Bennett *Customary Law in South Africa* (2008) 249.

⁸⁵ Luthuli note 40 above at 187.

status of black women was shaped through legal intervention and policy. Determinations of which class(es) or group(s) of people were to be defined as 'surplus' (and who should therefore be relocated to the homelands) included specific groups of black women, in addition to the other general groups into which these women also fell. Circular 2 of 1982 stated, for example that:

For convenience, the Blacks in the White area who are normally regarded as non-productive in the White area and should as such be given the opportunity of settling in a national state, are classified as follows:

- i. The aged, the disabled, widows, the women with dependent children....⁸⁶

The ability to label women in these ways provided the basis for their dislocation and displacement and the justification of their forced removal in accordance with the law. These interpretations and distortions of customary systems of law, and specifically as they related to tenure, crystallised certain conceptions of land rights within the 'official' customary law. The status of women as minors was stamped into the fabric of this body of law, as was the idea that women could not hold land in their own names. The narrative around women's customary land rights had been spun, casting women into what was presented as the only customary roles and positions for them.

Self-defined status – through the eyes of insiders

In spite of the prevalence of the distorted ideas that customary systems of tenure do not allow women to hold land in their own names, there is a body of literature that counters this narrative. Through the efforts of scholars who have drawn on historical archives and those who were embarking on empirical work from the 1950s and earlier, there is evidence of practice within customary communities that shows developments to the contrary.⁸⁷ This scholarship shows that in some cases the imposed 'rules' of customary tenure, as developed by colonial and apartheid administrators, were a departure from community practice.⁸⁸ This discussion of the

⁸⁶ Laurine Platzky and Cherryl Walker *The Surplus People: Forced Removals in South Africa* (1985) 29.

⁸⁷ For work drawing on historical archives see: Tara Weinberg 'Contesting customary law in the Eastern Cape: gender, place and land tenure' (2013) *Acta Juridica* 100 and for a selection of early empirical work see: Monica Hunter *Reaction to Conquest: effects of contact with Europeans on the Pondo of South Africa* 2 ed (1961) and Jack Simons *African Women Their Legal Status in South Africa* (1968).

⁸⁸ M. E. Elton Mills and Monica Wilson *Keiskammahoek Rural Survey* (1952) Volume 4, Chapter 2.

literature, drawing on early sources, together with later sources, presents a different lens through which to engage with status. By drawing out the narrative presented through the older sources that show instances in which single women could negotiate claims to land, and coupling that with recent developments of single women claiming land, we can begin to tease out a conception of status crafted by those from the 'inside', members of the communities whose land rights are at stake.

Tara Weinberg presents evidence of the struggles waged by Africans against the interpretation of customary law forced upon them by the colonial and apartheid states.⁸⁹ As she tracks the meetings of the Bunga Council, we see that repeated assertions were made that indicated that women accessing land was not contrary to customary law.⁹⁰ And yet, as the state sought to clamp down on African land access the first people to suffer were women. Weinberg shows how, through the use of gender biased criteria, the state was able to exclude women and then use codified customary law to justify this.⁹¹

In her work in the Eastern Cape in the 1950s, looking at the state's introduction of land rehabilitation in a context of increased landlessness, Anne Mager illustrates the manner in which the apartheid state made use of the recognition of women, particularly single women as a means of undermining patriarchy, disempowering African men, and increasing their reliance on the state.⁹² Mager casts the manner in which women made use of the state and its resources, and how they leveraged this in order to survive, as a limited form of empowerment:

And on Trust land, mothers with dependants were eligible for arable allotments. While their place as wives and daughters had brought no security, many women dared to take the initiative as mothers, seizing the opportunity of working land and becoming productive. If collaboration with the Trust meant access to land, if co-operation with the authorities allowed women to work, if

⁸⁹ Tara Weinberg 'Contesting customary law in the Eastern Cape: gender, place and land tenure' (2013) *Acta Juridica* 100 at 101 – 104.

⁹⁰ Weinberg note 89 above at 104 – 109.

⁹¹ Weinberg note 89 above at 101 – 104.

⁹² Anne Mager 1992 'The People Get Fenced': Gender, Rehabilitation and African Nationalism in the Ciskei and Border Region, 1945 – 1955' *JSAS* at 778.

acceptance of Trust regulations meant women could feed their children and retain their self-respect, then this was an option they would exercise.⁹³

Making use of the opportunity presented by the rehabilitation policy, women drew on their identities as mothers, and their identities as providers, to step out of the narrow role frequently ascribed to them by a patriarchal system. Where many of the colonial and apartheid laws saw women predominantly as wives and dependent on a male household head, these local practices and strategies countered how the state saw black women with self-defined ideas of who they were.

Discussions of women's land rights through the work of anthropologists writing on customary communities shows that there was room for flexibility, accommodation and, in certain instances, norms recognised by the family or community that secured women's land rights, such as rights to fields.⁹⁴ There was also no single fixed way in which to access land, as access was deeply linked to a range of relationships including village, clan and family relationships.⁹⁵ This related to the established connection between land and lineage and the recognition of land as a resource that is to be kept for future generations. The literature shows that these conceptions of land did not always necessitate the exclusion of women.⁹⁶ This literature presents a description of women's land rights and their place in African society that differs from that presented through the official laws and interpretations of the colonial and apartheid eras.⁹⁷ These more exclusionary and conservative narratives served the purpose of officially narrowing women's access to land and their social status. The more recent work discussing women's land rights in post-apartheid South Africa shows that in many ways there has not yet been a fundamental departure from these conservative narratives.⁹⁸ Recent legislative approaches by the democratic government are shown to not necessarily be considerate of or favourable to rural

⁹³ Mager note 92 above at 778.

⁹⁴ M. E. Elton Mills and Monica Wilson *Keiskammhoek Rural Survey* (1952) Volume 4, Chapter 2, Ruth Meinzen-Dick and Esther Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2008) 26 *Land Use Policy* 36.

⁹⁵ Meinzen-Dick and Mwangi note 94 above.

⁹⁶ Note 94 above.

⁹⁷ Jennifer Weir 'I Shall Need to Use Her to Rule': The Power of 'Royal' Zulu Women in Pre-Colonial Zululand' (2000) 43 *South African Historical Journal* 3.

⁹⁸ Land and Accountability Research Centre 'Aluta Continua: New Laws are a setback for Rural Women' (2016) *People's Law Journal* 35.

women.⁹⁹ It is within this context that I discuss the research and writing about the local changes and practices concerning women's rights and access to land developed in and by communities.

The work of Mills and Wilson in Keiskammahoek in the early 1950s provides evidence of the ways in which single women (widows, unmarried daughters with children and divorced women) were able to access land, in relation to both fields and homestead sites.¹⁰⁰ Whether through claims to certain land or through gifts and transfers based on family relations, single women had access to land through more means than were often formally recorded. In contrast to 'official' customary notions of women predominantly cast as wives, these authors record customary practices that reflect the broader range of roles that women occupy in their communities.¹⁰¹ Access to land for unmarried or divorced daughters and the claims of sisters are all shown to be accommodated through various means, differing only in accordance with the practices and rules observed under different tenure systems.¹⁰²

On land held under communal tenure, widows, in particular, had rights to the fields belonging to their deceased husbands. In the event that a widow chose to stay in the village of her husband she had the first claim over his fields, a claim that would take precedence over the claims of married sons.¹⁰³

A widow has the first claim on her deceased husband's field, taking priority even over her married sons...But if she chooses to continue in the village she should, according to traditional custom, be allowed to take over her husband's fields...A widow is the medium through which a field is kept for the agnatic descendants of the deceased. She is given the field to keep for her children until they are able to take it over for themselves after her death. If, however, the widow has no sons at the time of her husband's death she is not prevented from taking over the land herself.¹⁰⁴

⁹⁹ Land and Accountability Research Centre 'Aluta Continua: New Laws are a setback for Rural Women' (2016) *People's Law Journal* 35.

¹⁰⁰ Mills and Wilson note 44 above.

¹⁰¹ Mills and Wilson note 44 above.

¹⁰² Mills and Wilson note 44 above at 23 and 34.

¹⁰³ Mills and Wilson note 44 above at 16 – 17.

¹⁰⁴ Note 103 above.

However, where a widow chose to return to her natal village she would not claim her right to the fields. In the event that a widow chose to re-marry, upon relocating to her new home, she would not retain any claim to the land; the fields would pass to a male relative of her deceased husband for him to hold in trust for her children. This practice precluded the possibility of a man marrying a woman in order to gain access to the land that she held.¹⁰⁵ These practices and the protected claims of widows were central to being able to keep land within the family, without erasing or excluding the women from the picture. Mills and Wilson show that in a context of land scarcity, daughters who had returned from marriages or who had not married, but had borne children, were increasingly reliant on family relationships in accessing land.¹⁰⁶ Alongside these mechanisms through which single women historically accessed land, Mills and Wilson also point to the role played by the administration, mainly in the form of Native Affairs.¹⁰⁷ They show this role to be increasingly conservative and opposed to supporting the emergence of independent women.¹⁰⁸ The administration was not only intent on limiting the land rights of women by encouraging transfer of land to male relatives. It was also enforcing and developing policies and practices that were not aligned to what rural communities supported or practiced.¹⁰⁹ The authors capture the development of an official position that was increasingly disregarding the values that underpinned the approach taken by communities.¹¹⁰

The increased interference of the colonial and apartheid state placed the land supply under immense pressure and re-configured how people lived and how they would live in the future. This contributed in part to women's land rights being converted into secondary rights, dependant on the male household head.¹¹¹ As the colonial and apartheid governments sought to limit and relegate 'natives' to quartered off sections of the country, they found great use in the patriarchal elements of customary systems.¹¹² Foregrounding these and crafting a system of customary law and related tenure that kept women under the thumb of male authorities, also played a role in the

¹⁰⁵ Mills and Wilson note 44 above at 17 and 25

¹⁰⁶ Note 105 above.

¹⁰⁷ Mills and Wilson note 44 above at 11.

¹⁰⁸ Mills and Wilson note 44 above 2 at 24.

¹⁰⁹ Mills and Wilson note 44 above at 11 – 12 and 16 – 17.

¹¹⁰ Mills and Wilson note 44 above at 13 – 14 and 17.

¹¹¹ TW Bennett *Customary Law in South Africa* (2008) 251 – 252.

¹¹² Martin Chanock *The Making of South African Legal Culture 1902 – 1936 Fear, Favour and Prejudice* (2001) 243 – 260.

larger plan of limited rights for 'natives'. Interpretations of customary land rights that took on the lens of the European legal framework tended to favour and foreground certain patriarchal elements to the detriment of women. In pursuing an approach that kept black people disempowered the apartheid government provided limited forms of tenure for black people.¹¹³ These limited forms of tenure rarely provided space for women to access the limited rights they provided, and, in some instances, they specifically excluded women from holding any rights in land.¹¹⁴

As time progressed, not only were women frequently prevented from holding the limited rights available, but the other mechanisms through which women had previously accessed land were severely curtailed. Most notable of these curtailments was inheritance. Where previously, in certain instances, widows had claims that had been privileged over those of married sons,¹¹⁵ the Black Administration Act 38 of 1927 determined that the law of succession as it applied to 'natives' would be based on the rule of primogeniture.¹¹⁶ Effectively this gave preference to male relations of the deceased and all but erased pre-existing claims that widows and other female relatives may have had.

Writing about communal tenure in the village of Cata in the 1950s, Mills and Wilson describe the fact that married adult males, who are from the village and who do not have fields of their own, have to ask for an allocation of land. They go on to explain that this group is 'referred to as "starving people" (*abalambi*).'¹¹⁷ This description of a form of need-based claim resonates with the work of Sindiso Mnisi Weeks and Aninka Claassens who, writing about research done in the Mpumalanga in 2007, describe a vernacular system in which claims, based on need, are recognised *and accommodated*. Their work draws on interviews with women in the rural community of Mbuzini who describe the dynamic relationship between a secure right to one's fields and the recognised importance of providing for those in need.¹¹⁸ The early

¹¹³ Geoff Budlender and Johan Latsky 'Unravelling rights to land in rural race zones' in Michael de Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (1991) 115.

¹¹⁴ Note 113 above.

¹¹⁵ Mills and Wilson note 44 above at 16 – 17.

¹¹⁶ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para 35.

¹¹⁷ Mills and Wilson note 44 above at 13.

¹¹⁸ 'She explained the principle that a field belongs to an individual and is secure in that sense, but that rights to fields are also subject to the more pressing needs of those who do not have land on which to establish a home. She described this as an intrinsic indigenous value, and one with which she agrees.' Sindiso Mnisi Weeks and Aninka Claassens "Tensions between vernacular values that

work of Mills and others, read alongside the more recent work of Mnisi and Claassens speaks to two points: the first is a customary tenure system in which the underlying values allow for forms of individual security that have the flexibility to accommodate those in need and, secondly, the resurfacing of repertoires of need-based claims within customary systems and the endurance of particular underlying values.

The post-apartheid dispensation held the promise of a marked departure from previous interpretations of women's land rights. It also held the promise of legislative interventions that sought to promote and protect such rights in accordance with the Constitution. A glance at the legislative and policy interventions mooted and enacted by the democratic government, points to a promise not yet fulfilled. In recent years the government has proposed legislation to meet their obligations under section 25(6) of the Constitution, but the Communal Land Rights Act 11 of 2004 was ultimately struck down by the Constitutional Court on procedural grounds.¹¹⁹ At the same time, researchers, activists and academics pointed out that the Act would not have provided sufficient protection for women.¹²⁰ It is not only the land laws that are crafted in ways that are detrimental for women. Analyses by the Land and Accountability Centre, together with others, show that other laws and proposed bills will likely increase the vulnerability of rural women.¹²¹

In a context where the state's laws are not working for women in rural communities they remain insecure. Single women, together with their communities, are taking strides to address their insecurity. Community-led processes in relation to single women's land rights have been surfaced at scale through the work of the Community Agency for Social Change (CASE), who did a survey of 3000 women, spread across

prioritise needs and State versions of Customary Law that contradict them' (2011) 22 *Stellenbosch Law Review* 823 at 823

¹¹⁹ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

¹²⁰ Aninka Claassens and Sizani Ngubane 'Women, land and power: the impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) Ch 7.

¹²¹ Land and Accountability Research Centre 'Aluta Continua: New Laws are a setback for Rural Women' (2016) *People's Law Journal* 35, Factsheets and analysis by the Land and Accountability Research Centre is available here: www.customcontested.co.za, Thandabantu Nhlapo 'Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and 'living law'' (2017) 33 *South African Journal on Human Rights* 1 at 9 – 12, Sindiso Mnisi Weeks and Aninka Claassens 'Tensions between vernacular values that prioritise needs and State versions of Customary Law that contradict them' (2011) 22 *Stellenbosch Law Review* 823.

three sites in the Eastern Cape, the North West and KwaZulu Natal.¹²² Research into the land laws of Msinga in KwaZulu Natal also showed interesting shifts and differences in how neighbouring communities were responding to the needs of single women.¹²³ This work on the recent changes in communities' responses to the claims of single women raises interesting questions around the extent to which they reflect and draw on long existing values and enduring logics and on the new values and vision of the Constitution. It is evident that women draw on both in their articulations of their claims.¹²⁴

The research project undertaken by CASE came about after consultative meetings with rural communities in 2002/3, held to discuss the draft Communal Land Rights Bill. It is in these consultative meetings that these issues, which women in these communities were facing in relation to land, were raised.¹²⁵ Women in the meetings spoke about their struggles to be allocated residential land, when facing the threat of eviction by brothers, when they returned to their natal home upon the collapse of their marriages, or being forced out of their marital homesteads by their in-laws upon the death of their husband.¹²⁶ The CASE report by Budlender et al offers evidence that pushes back against claims that, in terms of customary law, women can only access land through their husbands or male relatives. As can be seen from the table below, the report shows that post-1994 there was an increase across all three sites in the number of single women (either never married or widowed), who reported that the plot upon which the homestead was built had been acquired through them.¹²⁷

¹²² Debbie Budlender, Sibongile Mgweba, Ketleetso Motsepe and Leilanie Williams 'Women, Land and Customary Law' Community Agency for Social Enquiry Research Report (February 2011), Aninka Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change* 71.

¹²³ Ben Cousins, Rauri Alcock, Ngididi Dladla, Donna Hornby, Mphethethi Masondo, Gugu Mbatha, Makhosi Mweli and Crieda Alcock '*Imithetho yoMhlaba yaseMsinga*: The living law of land in Msinga, KwaZulu – Natal' Research Report 43 PLAAS (June 2011).

¹²⁴ 'Often the principle of equality is asserted, and women refer to 'democracy' and the Constitution. They say that the times and the laws have changed, and that discrimination is no longer legal. In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birth right and belonging are woven together with the right to equality and democracy in the claims made.' Aninka Claassens and Sindiso Mnisi 'Rural Women redefining Land Rights in the context of Living Customary Law' (2009) 25 *South African Journal of Human Rights* 491 at 500.

¹²⁵ Aninka Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change* 71.

¹²⁶ Aninka Claassens and Dee Smythe 'Marriage, land and custom: what's law got to do with it?' (2013) *Acta Juridica* 1.

¹²⁷ Budlender et al note 122 above at 91 – 95.

	Pre – 1994	Post – 1994
Never Married		
Keiskammhoek (Eastern Cape)	9%	44%
Msinga (KZN)	3%	11%
Ramatlabama (North West)	9%	40%
Widowed		
Keiskammahoek	10%	48%
Msinga	9%	41%
Ramatlabama	15%	41%

The table above shows the percentage of never married and widowed women who reported that the plot was acquired through them for the period's pre- and post-1994 (Source: Women, Land and Customary Law, CASE 2011 at 91)

While there was a variation in the increases across the research sites, the insights explaining these post-1994 changes provided in the report and drawn from focus groups with men and women, carried many similarities.¹²⁸ Many of the participants attributed the difference in the pre-'94 and post-'94 numbers of single women able to obtain residential land to the new democratic government.¹²⁹ As a Cata male research participant stated:

Nowadays, if a person wants a site, even if they are female, land is allocated to them. They are given residential land. However, in the old days an unmarried person would not be allocated residential land.¹³⁰

Budlender et al also discuss at length the fact that, in addition to the transition to democracy and the enactment of the Constitution, changes in the rates of marriage also contribute to these developments related to single women and land.¹³¹ In their research report, describing the processes of change occurring in the Msinga District of KwaZulu Natal in relation to women's land rights, Cousins et al discuss the differences in the response to social change between two neighbouring traditional communities.¹³² The main changes commented upon by both communities were the

¹²⁸ Budlender et al note 122 above at 127 – 132.

¹²⁹ Law Race and Gender Research Unit and CASE Factsheet: Single Women, Customary Law and the Constitution 2011 at 3

¹³⁰ Budlender et al note 122 above at 129

¹³¹ Budlender et al note 122 above at 137 – 141

¹³² Ben Cousins et al '*Imithetho yoMhlaba yaseMsinga: The living law of land in Msinga, KwaZulu – Natal*' Research Report 43 PLAAS (June 2011) at 58 – 69.

increasing numbers of women raising children outside of a stable relationship or marriage, as well as the changes in marital practice that lead to increased numbers of co-habitations and 'partially' complete marriages.¹³³ The Mchunu traditional council has opted to respond to this by allocating land to single men and women, but in the Mthembu area this practice has not been adopted.¹³⁴ While the two communities have responded differently to the changing shape of families, the basis upon which single women are claiming land in the Mchunu area is centred on wanting to preserve relationships and provide for their families, a common feature across other research sites.¹³⁵

Conclusion

The story told by the literature in this chapter is one that pits imposed, top-down framing against framing that is determined from the bottom-up. The literature makes it clear that the framing of land rights is a tool used in the exercise of power. Those with the power to make determinations about how land rights are framed are well positioned to determine whose claims are valid and worth recognising. In the past, the ability to wield this tool resided with those whose intention it was to use it to entrench their own power. Current struggles over who makes determinations related to framing are being waged on two fronts: within communities where women are framing their claims on the basis of customary values and democratic rights; and in the legislative arena where law makers are drafting legislation designed to make determinations about the framing of rights in order to protect and secure those rights. The literature discussed here supports the point that it is important that the voice of women living in rural communities is heard. This is especially so given the impact that black women's historical exclusion from determinations about framing has had on their land rights.

The relationship between framing and determinations of status is a close one. The relationship is such that a top-down approach determines that status is necessarily assigned (or imposed) from an external positionality, whereas a bottom-up approach is influenced by self-determined definitions of status. Put differently, where people

¹³³ Cousins et al note 132 above at 59.

¹³⁴ Cousins et al note 132 above at 69.

¹³⁵ Cousins et al note 132 above at 67 – 68.

who are members of rural communities are able to take the lead in framing their claims to land, they are able to do so in terms that take into consideration the elements of status that matter to them, elements that may be related to acknowledging need and preserving family and community relationships. While there is no guarantee that bottom-up determinations will always reflect the best elements of a community, top-down approaches that deal in either/or absolutes cannot be said to be best suited to accommodating claims that draw on a system of complimentary interests.

Chapter Three

Methodology

Introduction

This chapter discusses the research method that I used to explore my research question. It details the rationale and design behind the small selection of interviews that I did with single (widowed and unmarried) women who had, exceptionally, gained access to residential sites of their own in the villages of Cata and Rabula in the Keiskammahoek area in the Eastern Cape. I begin by outlining why I chose these research sites, before moving on to discuss the research method adopted, and why individual and group semi-structured interviews were the appropriate instrument to use in gathering my data. I also embark on an analytical discussion of my data collection instrument and how the lessons drawn from the process of crafting the instrument will be drawn into my engagement and analysis with the data itself. I conclude by discussing the limitations and challenges of having elected to use this tool and how and from where I drew my sample.

Research Site

I chose the research sites of Cata and Rabula in the Eastern Cape because they formed part of the Keiskammahoek site that was included in the 2011 study undertaken by the Community Agency for Social Enquiry (CASE).¹³⁶ Being Xhosa-speaking and having family ties in the former Ciskei and Transkei, I chose to home in on the CASE research done in the Eastern Cape as opposed to KwaZulu Natal or the North West. Thus language would not be a challenge. The fact that these villages in the Eastern Cape had been part of this study piqued my interest in better understanding the developments happening in these communities specifically from the perspective of the women. At the time of undertaking my field work I was employed by the Centre for Law and Society's Rural Women's Action Research

¹³⁶ CASE conducted a large scale (n=3000) quantitative survey in three sites across North West, KwaZulu Natal and the Eastern Cape in 2011. This survey showed that in the Keiskammahoek area in the Eastern Cape there was a notable increase in the number of 'single' women who were able to obtain residential sites in their own names in the post 1994 era as compared to the period preceding 1994.

Project.¹³⁷ The project worked with community-based organisations (CBOs) in the area, making it possible for me to gain access to these communities. In Cata access was facilitated by Boniswa Tontsi a member of the Cata Communal Property Association (CPA) who also runs the Cata Museum. In the Rabula area access was facilitated by Mazibuko Jara of *Ntinga Ntaba kaNdoda*, a community-based organisation working in the area. After briefing both Sis' Boniswa and Mazibuko they found and contacted women in the community who had in recent years been allocated residential sites in their own names. With their assistance I arranged for interviews with the women to take place over the period of our visit to the area.¹³⁸

Method

This dissertation engages with the personal lived experiences of a small group of women living in the rural Eastern Cape, in order to develop a specific understanding of the manner in which they frame their claims to residential sites in their own names. This qualitative empirical data compliments the legal analysis conducted in this dissertation. Such data can only be obtained through qualitative mechanisms that allow for direct engagement with women and community members, as it is through the lens of their own experiences that we gain insights into the role of law in social relationships.¹³⁹

Although my research question engages with the themes that emerged from the CASE survey, in particular the apparently increasing number of single (unmarried, widowed) women who have been able to access residential sites in their own names

¹³⁷ The Rural Women's Action Research Project at the Centre for Law and Society has since become the Land and Accountability Research Centre (LARC) at the University of Cape Town.

¹³⁸ I was accompanied in the field by LARC Director Dr Aninka Claassens and former researcher Boitumelo Matlala.

¹³⁹ In order to express the richness of these experiences my inclination is to use broader conceptions to express terms that are in and of themselves somewhat contested. I expressly opt for terms that depart from the notion of one customary law or one system of customary land rights e.g. customary laws as opposed to customary law etc. I do this to mark a departure from the ways of thinking about customary law that informed the development of a body of 'official' customary law, which has been rejected under the Constitutional dispensation. I also try to embrace language that points to land in these systems being about both rights and relationships, as such I may refer to land rights and relations. I would rather opt for something slightly messy than to continue to use narrow language. It is also important to me that I convey the fact that race was a key lens through which framing and status were engaged with in the South Africa's past. This fact is central to understanding and engaging with how law was used in constructing particular racial identities. In order to do this I use the terms of racial classification as determined under apartheid through the The Population Registration Act 30 of 1950 the Act provided that all South Africans be racially classified in one of three categories: White, Black or Coloured.

in the years post 1994.¹⁴⁰ I was interested in learning about the way in which single women in Cata/ Rabula had framed their claims to residential land. I draw on their experiences and make proposals as to how law makers might approach security of tenure, particularly for women. To answer these questions I wanted to know the terms on which these women were requesting sites of their own and the reasons. I was also interested in the rationale that underpinned the community's response to the claims made by these single women. Prompted by the knowledge that there were already developments occurring in the Keiskammahoek area, related to single women accessing residential sites, I went there and interviewed a total of ten women and two men. These were split into individual interviews with five different women and two group interviews – one with five women from the village and one with two men from the Cata Communal Property Association (CPA), the structure responsible for local land administration.

The Research Instrument

I chose to use semi-structured interviews with individuals and with groups as the instrument through which to explore my research question. Choosing semi-structured interviews was motivated by the fact that interviews offered an opportunity to have detailed conversations with the women with whom I had spoken. Given that the CASE survey provides the large-scale quantitative framing I was able to tailor my aims and focus on a more specific set of issues with the intention of probing deeper into understanding how these women framed and acted upon their claims. Because I am specifically interested in the rich texture of individual lived experiences and the emerging themes and dynamics that these reveal, I opted for interviews that would allow the women's own narratives to unfold with minimal guidance. It was my hope that by allowing community members to share their experiences in a semi-structured way their responses would foreground what was really important to them in a more personal way than something like a standard questionnaire would have allowed. The conversation between these experiences of rural women and their reasoning and

¹⁴⁰ Debbie Budlender, Sibongile Mgweba, Ketleetso Motsepe and Leilanie Williams 'Women, Land and Customary Law' Community Agency for Social Enquiry Research Report (February 2011) at 91.

interpretation of said experiences and the law, in all of its complexity, is what interests me.¹⁴¹

I approach the topic of women's access to land from a more personalised angle with a view to learning from and understanding the individual experiences of the women that I spoke to. Semi-structured interviews are well suited to exploring my question as they allow for the personal narrative of the interviewee to unfold with only limited guidance from me as the interviewer.¹⁴² The group interviews provided a space for a mix of voices to engage in the conversation, which complimented the individual interviews. They were also a way for me to reach multiple women at one time and, importantly, they allowed women who may be uncomfortable with the individual interview an opportunity to speak to me as part of a collective. Using semi-structured interviews encourages and enables an interview in which the woman is allowed to share her journey with as little interference as possible. In my view this is valuable not only for the type of material that I wished to gather, but also to the broader topic within which my research question locates itself. The 'experts' in explaining what is happening in these communities, how it is happening and their understanding of these developments are the women and community members themselves.

My interviews were structured into questions about Process, Framing and Inspiration, Marital Status and, lastly, questions related to Demographics. Below I expand on the rationale that informed the questions asked within each of these categories.

The process questions

I chose to begin with a relatively open-ended question so that the interviewees did not feel that there was an expected correct answer or feel pressured into giving what they thought was the answer that I wanted to hear. The questions and sub-questions about process were intended to place the starting point and focus of the interview firmly on the experience of the participant as described in their own words. The interviewee's answer or description of the process and their experience could also

¹⁴¹ Clifford Geertz *The Interpretation of Cultures* (1973) 310 and Sharlene Nagy Hesse – Biber *Mixed Methods Research: Merging Theory with Practice* (2010) Ch 2 at 32 – 33.

¹⁴² Michel Quin Patton *Qualitative Research and Evaluation Methods* 3 ed (2002) Ch 7 at 342 – 348, Sharlene Nagy Hesse – Biber *Mixed Methods Research: Merging Theory with Practice* (2010) Ch. 2 at 46 and 50 – 51.

potentially highlight the names of people that could be re-visited and interrogated further as the interview progressed. Not only was this useful, as it provided other people to follow up with, but it also identified whether there were certain key role players who were a common feature in each person's experience. This points to what other actors are part of the process and gives a sense of whether there are unique actors who enable or facilitate this process, clarifying whether the process is driven by a select few or is available regardless of the actors. Such an indication is useful when thinking about issues of traction and sustainability of process. I asked questions about other actors in the process, as well as questions about personal networks of support, as distinct from the actors who are a necessary part of the process. I believe such questions speak to the social positionality of the interviewee and to whether their experience was harder or easier because of who they could or could not draw on for assistance and support.

The framing and inspiration questions

From the framing and inspiration questions I was looking for the women's articulation and understanding of their claim. By asking a set of question related to who or what inspired the women I was interested in engaging with the extent to which the inspiration came from external or internal sources or a combination of both. The CASE survey and other literature that I seek to be in conversation with, identify several factors (eg, democracy, declining marriage rates etc) as possible sources of inspiration or catalysts. I wanted to open up the possibility of the interviewee pointing to other catalysts that may confirm, rebut or further colour our thinking around what serves as a catalyst. The initial questions were about who the interviewee may have looked to for inspiration or who they may have knowingly or unknowingly been modelling themselves upon. If there is no one that the interviewee looked to in this way I was able to follow up as to why that was and whether it carried any meaning – did the interviewee just not know of anyone? Was the interviewee among the first?

Whereas the earlier question asked the interviewee to consider more internally located sources of inspiration (within themselves or within their network) the next questions asked them to consider the external catalysts. Again, the answers that these questions could yield were useful because they could confirm, challenge or deepen the assumptions that I had and the positions taken in the existing literature.

Within this set of questions, I asked about what events were taking place in their local context at the time of them acquiring land. This was to probe whether there were any common experiences that this interviewee and other women had that may have served as inspiration for her. I was also interested in whether the interviewees saw themselves as an example or inspiration to others. If not, why not? Do they think that they could be an inspiration? Was this part of their thinking when they set out to obtain a site? For me, the value in asking this question is that it asked the interviewee to locate their experience in relation to others and with respect to what meaning it could have for others, not just themselves.

The marital status questions

My research is interested in the developments related to women identified as single. As such, determining marital status was relevant. In asking these questions I needed to be mindful of the challenges raised in the CASE survey and other work around the differences in conceptualisation of marriage.¹⁴³ In the 'Western' conception, the question of marital status can usually be answered quite conclusively. One is either married or not. In the African conception, academics have shown that marriage is more processual, with various stages leading to some form of acceptable 'completion', often over a lengthy period of time.¹⁴⁴ With this in mind it was important to include a variety of terms to describe relationships of 'marriage' or cohabitation.¹⁴⁵ This also allows for a wide conception of 'single'. Studies have shown that in some of the areas there was a relationship between having children and a 'single' woman's ability to obtain a residential site in her own name. I asked questions about having children in order to pick up on any such connections.

The demographics questions

¹⁴³ See pre-survey focus groups on types of relationships and terminology in Debbie Budlender, Sibongile Mgweba, Keteetso Motsepe and Leilanie Williams 'Women, Land and Customary Law' Community Agency for Social Enquiry Research Report (February 2011) at 30 – 34.

¹⁴⁴ Ben Cousins, Rauri Alcock, Ngididi Dladla, Donna Hornby, Mphethethi Masondo, Gugu Mbatha, Makhosi Mweli and Crieda Alcock '*Imithetho yoMhlaba yaseMsinga: The living law of land in Msinga, KwaZulu – Natal*' Research Report 43 PLAAS (June 2011) at 60 – 63.

¹⁴⁵ In IsiXhosa the commonly used terms in asking the question: Are you married? Are: Wendile? Or uTshatile? Wendile is used mainly by older people and is associated with having undergone the rituals and customs of a traditional Xhosa marriage. Tshatile is more commonly used by younger people and is associated with a church wedding/ white wedding without the rituals of the traditional Xhosa marriage ceremony. Ukuhlalisana is the term commonly used to describe cohabitation.

I opted to ask the questions related to demographics last rather than first. This was to put participants at ease, because even though questions about age seem straightforward, it is my experience that they can be difficult to answer for older members of rural communities who often do not know their exact age or date of birth. The basic questions that I asked were about the participant's age, their level of education and what source(s) of income they are reliant on. The questions about age could point to interesting patterns and developments around generational shifts and changes. The question about levels of education could point to specific particularities brought about as a result of differences in levels of education. I asked the questions about sources of income in order to determine what financial resources the women had access to and whether this had any bearing on their ability to obtain a site. Also, given the high levels of poverty in the area and in the province more generally, determining the reliance on state support was contextually relevant.

Working with Interviews

My sample selection was guided by the community contacts who I relied on to help me access the community and introduce me to the women who I would interview. I was also reliant on the recommendations of the women I interviewed as to who else I could or should speak to. This snowballing approach meant that the women selected (and recommended) for the interview would likely all have similarities, which may have meant that I was unlikely to find a 'conflicting voice' or someone with a vastly different experience to the majority. Although this could present some weaknesses in my analysis I think that because it is not my intention to make generalising claims based on the interviews this selection process is not compromising. Given the fact that the intention in using semi-structured interviews is to delve deeper into the personal experiences and interpretations of individual women, this somewhat self-selecting, snowball sample is appropriate for those purposes.

A challenge related to the instrument, in particular, is the fact that the interview questions were translated from English into isiXhosa. This process presents a challenge as there is always concern around the accuracy of the translation and the difficulty of conveying concepts and terms that carry particular meanings in their language of 'origin' into another language with its own concepts and terms.¹⁴⁶ This is

¹⁴⁶ Quin Patton note 142 above at 391 – 394.

equally a challenge when translating the questions, as it is when translating and transcribing the actual interviews.¹⁴⁷ In the process of translating and transcribing the interviews I was concerned about altering the meaning of what interview subjects had said and not accurately representing their words on paper. There is a positive spin off to having gone through the translation process because it required of me to think carefully about how I phrased my questions and steered me away from drafting and asking overly complicated questions. Being conscious of the fact that I would have to carry these questions into another language and the process of doing that, repeatedly forced me to come back to what it is that I wanted to understand when asking a particular question. I was also pushed to think carefully about terms I used, and when and why I used them. It encouraged the use of simple language and short focused questions.

It would be artificial to not acknowledge myself and my positionality as part of the translation process. My knowledge of the language, while certainly useful, also has limitations, not least of which were the limits of my isiXhosa vocabulary. Even though I was able to translate terms and meaning with relative accuracy, there is always room for improvement and the use of terms, especially technical ones, unknown to me that could better convey meaning. To mitigate this I would use the isiXhosa term known to me and would carry that term into the English translation making a note of the possible ambiguities. I also found that breaking technical English terms into descriptive Xhosa phrases was also useful in managing the ambiguities.

Conducting the interviews

In Cata the interviews and focus groups were conducted at the community hall. The hall is located at the heart of the community and is generally within walking distance of people's homes, so there were no travel costs (or any other financial implications) incurred by any of the women. Allowing the women the option of meeting at a place that is not their home, but that is local and familiar, provided them with a sense of privacy, as well as security. It relieved them of any anxiety associated with inviting strangers into their homes. I also hoped that it would make it easier for women to decline the request for an interview than if we were outside their home. In Rabula the

¹⁴⁷ Editor's Interview with Richa Nagar (2016) 2 *Journal of Narrative Politics* 73 and Michel Quin Patton *Qualitative Research and Evaluation Methods* 3 ed (2002) Ch 7.

interviews were conducted at the homes of the women, mainly because there was no centrally located hall in the area and fewer interviews were conducted. In order to allow the women space to decline, they were all contacted by phone beforehand. None of the women that I approached for an interview declined. Although our presence in the villages was evident, as community members could see our car (and the women coming and going) outside the hall or individual homes, all the interviewees were assured that their real names would not be used when I wrote up the interviews.

Conclusion

The process of grappling with my chosen methodology and the particular instrument that I used has flagged two lessons that will be drawn into my analysis. The first is around the use of isiXhosa terms and phrases, and the second is the importance of foregrounding what the women themselves choose to foreground. In relation to the use of isiXhosa terms and phrases the processes of translating and carrying concepts across languages has encouraged me to be open to using the Xhosa phrases that the interviewees used, rather than doing their words a disservice by translating them. Foregrounding what the women themselves place emphasis on, as opposed to only what interests me, should inform how I approach the data. This ensures that I am guided by the women themselves in relaying their experiences as opposed to merely mining the data for answers that support my assumptions.

Chapter Four

Laws and Policy

Introduction

This chapter gives an overview of, and discusses the laws, regulations and policies adopted in the governance and recognition of land rights spanning the colonial, apartheid and democratic governments. The chapter begins by describing the pivotal laws and regulations enacted by the colonial and apartheid governments in dealing with the question of land rights for black South Africans. These laws and regulations were instrumental in furthering land segregation and entrenching the idea of limited rights in land for black South Africans. In pursuance of this objective these laws and regulations were the catalysts for much of the dispossession that occurred in what is now rural South Africa. Having engaged with the legal instruments involved in crafting historical land injustice in South Africa, I move on to lay out the legal framework as it exists currently, including legislation and policy. Of particular importance are those laws and policies that impact on tenure security on communal land, located in rural South Africa. As the legal marker of South Africa's transition, the discussion starts with the Constitution, and in particular section 25. Laws that find their roots in the Constitution's mandate are then looked at in some detail. Although there are several laws that impact on communal land more broadly, these are excluded from this overview in order to align with the research question being interrogated here.

For the sake of a fuller picture and better contextual understanding, this chapter also looks at the laws related to traditional leadership. Specifically, the discussion includes the framework legislation that provides definitions, roles and functions for traditional leadership. The discussion is limited to the sections of this legislation dealing with the administration of land in communal areas in rural South Africa. These areas of communal land overlap, by design, with the areas in which the majority of traditional leaders exercise authority.

With the overview of the key pieces of legislation and policies complete, the chapter concludes by considering questions related to the progression and development of laws geared towards protecting and securing land rights in rural South Africa, and

the particular implications that these developments have for women living in rural communities.

The Past

The point has been made repeatedly that the process of segregation and land dispossession began well before the coming into power of the apartheid state.¹⁴⁸ The Glen Grey Act 25 of 1894 has been described as one of the key pieces of legislation that laid a foundation for spatial segregation in South Africa.¹⁴⁹ Under the apartheid state the most prominent land laws passed were the Natives Land Act of 1913 and the Natives Trust and Land Act of 1936. Together these laws played a key role in continuing patterns of dispossession and exclusion which had characterised the approach taken during colonialism.

The Glen Grey Act

In the main, the Glen Grey Act was concerned with three things: land, labour and the franchise.¹⁵⁰ Although it was only applied in certain areas of the Cape Colony, the premise underlying this Act was one of racial segregation and its drafter, Cecil John Rhodes, hoped that the Act would find much wider application in other British colonies in Africa, referring to it as ‘a bill for Africa’.¹⁵¹ The Glen Grey Act effectively introduced an early form of quitrent tenure based on the principle of ‘one man, one plot’. A limited amount of land would be assigned to individual families and the

¹⁴⁸ ‘In assessing the importance of the 1913 Natives Land Act for South Africa’s land dispensation in the 20th century, historians have emphasized the need to understand what Jacob Dlamini calls the “pre-history” of this act. This means engaging with the complexities of the history of colonial conquest south of the Limpopo River in the 250 years preceding the act, beginning in 1652.’ Cheryl Walker ‘The Land Question in South Africa: 1913 and Beyond’ *Oxford Research Encyclopedia of African History* March 2017 available at:

<http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-79> accessed on 4 November 2017 see also: Colin Bundy ‘Land, Law and Power: Forced Removals in Historical Context’ in Christina Murray and Catherine O’Regan (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 4 – 5.

¹⁴⁹ TW Bennett ‘African Land – A History of Dispossession’ in Reinhard Zimmermann and Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Ch 2; Ian Loveland *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa, 1855-1960* (1999) 37 – 38.

¹⁵⁰ Glen Grey Act 25 of 1894 ss 2 – 6, 26 – 29 and s 33. See also: R.J. Thompson & B.M. Nicholls ‘The Glen Grey Act: Forgotten dimensions in an old theme’ (1993) 8 *South African Journal of Economic History* 58.

¹⁵¹ R.J. Thompson & B.M. Nicholls ‘The Glen Grey Act: Forgotten dimensions in an old theme’ (1993) 8 *South African Journal of Economic History* 58 at 58 see also: ‘The Glen Grey Speech’ given by Cecil John Rhodes on the second rereading of the Glen Grey Act to the Cape House Parliament on July 30 1894 available at: http://www.sahistory.org.za/sites/default/files/glen_grey_speech.pdf accessed on 12 August 2017.

household head would be issued with title to that land. Land accumulation in excess of the allotted portions was not encouraged. Those who did not qualify for quitrent title would be forced to go and become part of the labour force, thereby reducing overcrowding in native areas.¹⁵² The Act's formulation provided that, on the death of the household head, the property should pass to the eldest son, in accordance with the rules of male primogeniture, which the government of the day took to be the customary rules for inheritance.¹⁵³ Speaking in support of the Act at its second reading in the Houses of Parliament, Rhodes argued that:

These people are given a piece of land, and they are very domestic in their nature. Four morgen of land would not split up into much for each of the family, in case of the death of the native who was the head of the family. The only way to meet this is by the native law of primogeniture. The only way to deal with it is by the law of entail — leave it to the eldest son. We fail utterly when we put natives on an equality with ourselves. If we deal with them differently and say, "Yes, these people have their own ideas," and so on, then we are all right; but when once we depart from that position and put them on an equality with ourselves, we may give the matter up.

The Glen Grey Act was but one of an array of laws and practices across the colonies and later the Boer Republics that gave effect to land dispossession.¹⁵⁴ It is significant because it made clear the ambitions of its drafter to effectively limit the ability of black people to accumulate land. It was one of the most explicit beginnings of the crystallisation in law of a particular narrative about black people and land. That narrative included male primogeniture as an inherent part of customary tenure systems.

¹⁵² TW Bennett 'African Land – A History of Dispossession' in Reinhard Zimmermann and Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Ch 2.

¹⁵³ 'The Glen Grey Speech' given By Cecil John Rhodes on the second rereading of the Glen Grey Act to the Cape House Parliament on July 30 1894 available at: http://www.sahistory.org.za/sites/default/files/glen_grey_speech.pdf accessed on 12 August 2017.

¹⁵⁴ 'Wide-scale dispossession of land from the indigenous communities of South Africa was, of course, not a phenomenon which only began in 1913. The forcible dispossession which went with colonial conquest had already had a massive impact on the distribution of the African population.' Alan Dodson 'The Natives Land Act of 1913 and its legacy' (2013) 26 *Forum* 29 – 32 at 29.

Natives Land Act

Natives Land Act 27 of 1913

BE IT enacted by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:

- (1) From and after the commencement of this Act, land outside the scheduled native areas shall, until Parliament, acting upon the report of the commission appointed under this Act, have made other provision, be subjected to the following provisions, that is to say: -

Except with the approval of the Governor General

- a. a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover; and
- b. a person other than a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a native of any such land or of any right thereto, interest therein, or servitude thereover.

Although the 1913 Natives Land Act did not create dispossession overnight, it did codify and entrench the continuous dispossession that had been occurring throughout the colonial period in the colonies and the Boer Republics. The Act was an attempt to answer the 'ever-present' 'native question'¹⁵⁵ that plagued the government of the day. It was presented as a solution to the concerns of white

¹⁵⁵ '...the native question. Briefly put, how can a tiny and foreign minority rule over an indigenous majority?' Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (1996) 16 and 'With increasing conquest of Africans came the issue of how to deal with African people, which the government termed the "Native question." In a nutshell, the term was loosely defined in the 1903 Intercolonial Conference as "embracing the present and future status of all aboriginal natives of South Africa, and the relation in which they stand towards the European population.' The Natives Land Act of 1913 available at: South African History Online <http://www.sahistory.org.za/topic/natives-land-act-1913> accessed on 4 November 2017.

farmers in the Boer Republics in particular, who were concerned with having to compete with native groups able to purchase farms. Also of concern for them was the lack of incentive for natives to give farmers their labour where share-cropping and cash rental arrangements existed.¹⁵⁶ By building on the discriminatory practices of the Colonies and the Boer Republics the Act concerned itself with securing a native labour force and furthering policies of segregation. While the Act applied differently across the various parts of the Union, its ultimate impact was to intervene in relationships of land holding in the favour of white land owners.¹⁵⁷

Through this Act an initial 7 - 8 per cent of land, in what was then the Union, was reserved for 'natives'. The portions of land that made up this percentage were known as the 'reserves' and ownership or purchasing of land outside of these reserves by 'natives' was part of what the Act sought to curb and outlaw. The Act contained provisions that made it explicitly unlawful for natives to acquire any rights to land that fell outside of these scheduled native areas, unless permitted by the Governor-General.¹⁵⁸ Within the scheduled areas, natives were only permitted to transact with other natives, and non-natives were precluded from acquiring rights to land that fell within the scheduled reserve areas.¹⁵⁹ The implications of these provisions were severe, as they outlawed various tenancy arrangements that had endured for generations and forced black families and communities out of their homes and off land that they had occupied for much of their lives.

Black tenant farmers who had been living and farming on white-owned land through various arrangements including rental tenancy, share-cropping and labour tenancy were now forced into making the awful choice of either agreeing to labour under the restrictive terms set by the white land owner or to leave.¹⁶⁰ Labour tenancy and

¹⁵⁶ Dodson note 154 above.

¹⁵⁷ 'The reserves benefited the white ruling class in different ways. They created a physical and social space in which to contain large numbers of black people at minimal cost. No one expressed this purpose more succinctly than Godfrey Lagden, Milner's Commissioner of Native Affairs in the Transvaal. Should the Transvaal (he was asked) eject Africans from the reserves and thrust them on to the labour market? No, he replied: "A man cannot go with his wife and children and his goods and chattels on to the labour market. He must have a dumping ground. Every rabbit has a warren where he can live and burrow and breed, and every native must have a warren too.'" Colin Bundy 'Casting a long shadow: The Natives Land Act and its legacy' Introduction in *Umhlaba 1913 – 2013: Images from the exhibition commemorating the centenary of the Natives Land Act of 1913* (2013) 15 - 23 at 19.

¹⁵⁸ Act 27 of 1913 section 1(1).

¹⁵⁹ Act 27 of 1913 section 1(1)(a)(b)(c) and section 1(2).

¹⁶⁰ Dodson note 154 above.

share-cropping had allowed black tenant farmers living on white-owned land to live and farm on the land while paying rent to the land owner either through sharing a portion of their crops or by providing labour to the land owner at certain times in the year. For many tenant farmers these arrangements had allowed them to become successful small-scale farmers. The outlawing of rental tenancy and share-cropping arrangements meant that these farmers would lose the livestock, homes and crops that these arrangements had allowed them to accrue.¹⁶¹ The Natives Land Act also disrupted the lives and arrangements of black land-owning groups who had made 'nominee arrangements' with missions and other bodies.¹⁶² It dispossessed blacks who managed to purchase land, including small numbers of black families and community groups lead by traditional leaders who had managed to purchase land, which now fell outside of the scheduled native areas.¹⁶³ The Act made it illegal for natives to own land outside the reserves and these land-owning groups were effectively dispossessed of the land that they had acquired.¹⁶⁴

As a consequence of having their tenancy arrangements outlawed, some groups of black tenant farmers were left displaced and without options. Others were forced to relocate, leaving behind the legacy of generations. What the 1913 Land Act failed to address fully was the question of where those displaced by the implementation of the Act would go. The Act was passed before the Commission provided for in the Act itself, could conclude its work on setting aside land to accommodate those displaced.¹⁶⁵ The question of where the displaced would be settled was answered in 1916 with the report of the Beaumont Commission, established under the 1913 Act. Part of the rationale for passing the Native Trust and Land Act of 1936 was in order to implement the findings of the Commission.

Natives Trust and Land Act

The Natives Trust and Land Act 18 of 1936 (the "1936 Land Act") was designed to be read together with the Natives Land Act of 1913. The first section of the Natives

¹⁶¹ Colin Bundy 'Casting a long shadow: The Natives Land Act and its legacy' Introduction in *Umhlaba 1913 – 2013: Images from the exhibition commemorating the centenary of the Natives Land Act of 1913* (2013) 15 – 23.

¹⁶² Dodson note 154 above.

¹⁶³ Dodson note 154 above.

¹⁶⁴ Act 27 of 1913 section 6.

¹⁶⁵ Act 27 of 1913 ss 2 and 3.

Trust and Land Act states that the two Acts should be read “as if they formed one Act.” It is through the 1936 Land Act that additional land was made available to accommodate the Black people displaced by the restrictions introduced by the 1913 Act. While this increased the total amount of land to which Black South Africans were to be confined to about 13 per cent of the country, the core purpose was still complete segregation.¹⁶⁶ This Act created the South African Natives Trust (SANT) – later the South African Development Trust (SADT) – as the vehicle used by the state to acquire, through purchase, additional portions of land adjacent to the reserves, in order to consolidate the reserves into what would later become the Bantustans. In 1916 the Beaumont Commission released its report recommending that an additional 7 million hectares be acquired for the reserves.¹⁶⁷ Ultimately some 6 million hectares (termed released areas) was to be transferred under the 1936 Land Act.

The Natives Trust and Land Act sought to extend the application of the limitations and restrictions of the 1913 Land Act to the additional land to be acquired through the SANT/SADT. It also introduced new mechanisms for advancing segregation and ultimately entrenching dispossession. Section 13(2) of the Act provided for the expropriation of land held under freehold title by natives in areas that were designated exclusively as white areas under this Act and the 1913 Act. Such land was considered to be a ‘black spot’ by the government and this provision allowed for the lawful eviction of black families and communities leading to their forced removal from such land. The Act introduced the concept of ‘squatters’ – often natives who had lived on white-owned land for generations without paying rent or providing labour – requiring that their presence on the land be registered. The Act required the registration of labour tenants by the land owner, with the state reserving the power to decrease the number of labour tenants on a farm at any given time. It was this Act that finalised the abolishment of labour tenancy by proclamation leaving many former labour tenants displaced.¹⁶⁸

Forced removals

¹⁶⁶ Bundy note 161 above.

¹⁶⁷ Dodson note 154 above at 30.

¹⁶⁸ Dodson note 154 above at 30, Cheryl Walker ‘The Land Question in South Africa: 1913 and Beyond’ *Oxford Research Encyclopedia of African History* March 2017 available at: <http://africanhistory.oxfordre.com/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-79> accessed on 4 November 2017.

The introduction of 'formal' apartheid in 1948 and the move into the period of 'grand apartheid' in the 1960s embedded racial segregation as part of the law. The enforcement of apartheid laws and policies was backed and enabled by a large state machinery. This state apparatus played a large part in the brutal removals that have defined and continue to define so much of South Africa's countryside. Through a process of 'relocation' and strict application of influx control laws the apartheid state sought to remove blacks from 'white South Africa' and keep them out, allowing them entry and access only as part of a migrant labour force.¹⁶⁹ In an escalation of the segregation policies the apartheid state sought to make all black South Africans citizens of one of the bantustans. By assigning all black South Africans to these separate territories, forcefully constructed around ascribed tribal identities, the state made black South Africans foreigners in the land of their birth.

The process of ensuring that blacks, who were not part of the labour force in white areas, lived in and were affiliated with a bantustan gave rise to extensive and devastating forced removals. Informed directly and indirectly by the 1913 and 1936 Land Acts the project of segregation continued to pick up momentum and so did the forced removal of black people from 'white South Africa' into the homelands. The work of the Surplus People's Project and others records that at least 3.5 million black people were forcibly removed over a 23-year period between 1960 and 1983.¹⁷⁰ The destruction and devastation of the removals process was heightened only by the conditions of the resettlement areas that families and communities were forced into. These areas were often cramped and severely under-resourced, with no running water and only temporary housing structures available. Families and communities were torn apart and dumped in amongst strangers far away from resources, access to urban employment, sites of cultural significance and their ancestral graves.¹⁷¹ The impact of forced removals was devastating for all who were affected by them, both directly and by extension or association.

¹⁶⁹ Hilary Sapire 'Engendering Segregation: 'Black Women's Work' in the Urban American South and South Africa in the Late Nineteenth and Early Twentieth Centuries' (2000) 43 *South African Historical Journal* 39 – 80 at 51 – 53 and Colin Bundy 'Land, Law and Power: Forced Removals in Historical Context' in Christina Murray and Catherine O'Regan (eds.) *No Place to Rest: Forced Removals and the Law in South Africa* (1990).

¹⁷⁰ Laurine Platzky and Cherryl Walker *The Surplus People: Forced Removals in South Africa* (1985) 9.

¹⁷¹ Cosmas Desmond *The Discarded People: An Account of African Resettlement in South Africa* (1970) 336 - 338

The forced removals were effected through a number of legal instruments. The state made effective use of these instruments and ensured that the processes surrounding every relocation found grounding in one or other law or regulation. The state made use of its force and the power of the law to legalise the dispossession and dislocation of black people. The dynamics of this use of the law meant that what has been described as an immoral act was given the cloak of legality and invoked the language of compliance and order.¹⁷² As Platzky and Walker noted at the time:

People are driven from their homes, loaded onto trucks and transported to relocation sites, their properties are numbered and expropriated, their houses are demolished by bulldozers and they are prevented from entering certain areas, all in terms of the law.

Legislative sanction exists for every one of these procedures; in most cases more than one law can be used as authorisation for officials. Different laws apply in the various categories. In some the law does offer greater protection than in others. Those with title deeds are assured of better treatment than those without; scheduled land cannot be cleared quite as easily as non-scheduled land.

None of the protections that do exist can stop removals, however. In all categories relocation takes place in terms of the law.¹⁷³

The role of the law was to offer a sense of protection in the form of fair, legislated procedures for the removal of people but it was not intended for the law to be able to stop the forced removal of any group or community. Use of the law in this way was viewed by apartheid authorities as a subversive use of the law and loopholes were often closed through additional legislation or amendments to existing laws.

Black Areas Land Regulations – land rights in black areas

By the 1960s virtually all rural black land was state owned. It was either owned by the government of the Republic of South Africa or the bantustan governments or the SADT.¹⁷⁴ Within this schema black people could never be given full rights of

¹⁷² Platzky and Walker note 170 above at 138 – 140.

¹⁷³ Platzky and Walker note 170 above at 138.

¹⁷⁴ Geoff Budlender and Johan Latsky 'Unravelling rights to land in rural race zones' in Michael de Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (1991) Ch 6.

ownership as defined under the common law, but they were assigned limited land rights aimed at allowing them some form of tenure security. These took varying forms, some of which are described below.

The Black Areas Land Regulations of 1969¹⁷⁵ provided the dominant legal structure of land tenure for black people living in rural areas. Black areas included the land that was termed “scheduled areas” under the 1913 Land Act and “released areas” under the 1936 Trust and Land Act. These regulations created two main forms of tenure for land held by black people. The first was quitrent tenure (which applied to surveyed land) and the other Permission to Occupy (which applied to unsurveyed land).¹⁷⁶ Both forms of tenure have been said to be analogous to ownership, however the holders of these forms of tenure are not referred to as owners and they do not have the full rights of ownership in common law.¹⁷⁷

Quitrent tenure gives the holder the right to possess the land in perpetuity, however the right to sell or otherwise alienate the land is not conferred to the holder.¹⁷⁸ There are various restrictions placed on a holder’s ability to transact without the consent of the Chief Commissioner or, in certain cases, the Minister. All holders are required to pay an annual fee and failure to make the annual payment can result in the cancellation of quitrent title.¹⁷⁹ There are restrictions on the size of a surveyed plot held under quitrent title and these too cannot be exceeded without special approval.¹⁸⁰ As with other forms of tenure the holder of a quitrent title has no claim on any mineral rights (where these apply), as all mineral rights remain vested in the state. Under the regulations, the Minister of Native Affairs was given the power to cancel quitrent title on a number of grounds, including but not limited to: failure to beneficially occupy the land, failure for two consecutive years to pay the annual quitrent, and in the event that the land is no longer being used for the approved purpose.¹⁸¹

¹⁷⁵ Proclamation R188 of 1969 as amended.

¹⁷⁶ Budlender and Latsky note 174 above at 122.

¹⁷⁷ Budlender and Latsky note 174 above at 123.

¹⁷⁸ Budlender and Latsky note 177 above.

¹⁷⁹ Budlender and Latsky note 174 above at 124.

¹⁸⁰ Budlender and Latsky note 174 above at 123 see also: Regulation 14(2) of Proclamation R188 of 1969.

¹⁸¹ Budlender and Latsky note 177 above.

Quitrent tenure had restrictions that impacted upon women specifically. Women were excluded from being able to inherit quitrent title upon the death of the holder.

Quitrent title would be inherited in accordance with the rule of male primogeniture, the title going to the customary law heir (a male) who would be determined using the 'Tables of Succession' in the regulations.¹⁸² Add to this the fact that the title holder was forbidden from bequeathing their quitrent title by means of a will and it is clear that women had no means to access quitrent title through inheritance.¹⁸³

The discussion above has looked at some of the pinnacle laws and accompanying regulations that shaped the course of land rights for all black South Africans, but especially for those living in present day rural South Africa. The discussion has shown the progressive dispossession of black people as increasing limitations were placed on their land rights. The discussion below looks at the legal framework governing land rights in post-apartheid South Africa, with a particular focus on the legislation and policy documents most pertinent to communal land and the rural communities who live on it.

The Constitutional Framework

The Constitution

All law in South Africa derives its validity and legitimacy from the Constitution. That no law can be inconsistent with the Constitution is a foundational principle of our constitutional democracy.¹⁸⁴ Naturally this applies to all laws, both current and proposed, dealing with land ownership and management anywhere in the Republic, including the former bantustans where the land is often understood to be held under communal tenure and in accordance with customary law.¹⁸⁵ The Property Clause, as section 25 of the Constitution is commonly referred to, is explicit in its protection of property rights.¹⁸⁶ Its approach in doing so has been criticised for entrenching

¹⁸² Regulation 35(1) of R188 of 1969.

¹⁸³ Budlender and Latsky note 174 above at 123.

¹⁸⁴ Constitution of the Republic of South Africa, 1996 section 2.

¹⁸⁵ Constitution of the Republic of South Africa, 1996 section 8.

¹⁸⁶ Constitution of the Republic of South Africa, 1996 ss 25(1) and (5) – (9)

Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

private ownership obtained at the expense of black South Africans and for being an obstacle to land reform.¹⁸⁷ This, however, is a larger, overarching debate that will not be discussed here in very much depth. Instead I will be engaging with specific criticisms related to the particular provisions of the Property Clause dealing with land reform that are discussed below. My intention is not to have an exhaustive discussion of the overarching debates regarding this entire section. If the context laid out in the opening sections of this chapter are the 'before' picture then the role of the Constitution is to provide guidance on the creation of the 'after' picture. The Constitution provides the most rudimentary instruction for how South Africa should reshape or reform dynamics around land. In fulfilling its role as an instrument for land justice it provides the basic minimum expected protections of and recognition for land rights.

Land Reform and the Constitution

Post-1994 South Africa is faced with the task of land reform as a necessary mechanism for undoing the legacy of our divided past. Perhaps the most notable example of law makers' commitment to this task is the fact that under the guidance of our first democratically elected President, Nelson Mandela, one of the early pieces of legislation passed by South Africa's representative parliament was the Restitution of Land Rights Act 22 of 1994. In light of South Africa's history and the commitment to redress enshrined in the Constitution it is clear that there are a variety of systematic undoing's that need to take place for the promises of democracy to have a chance of being real. Chief among these is a re-arranging of land ownership patterns, redress for those who were wrongfully dispossessed, and the recognition

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

¹⁸⁷ Transcript of the debate in the National Assembly on amending section 25 of the Constitution, Tuesday, 28 February 2017 available here: <http://www.politicsweb.co.za/documents/malema-and-the-section-25-land-debate-full-transcr> accessed on 12 August 2017.

and protection in law of those whose tenure rights were erased or rendered insecure.¹⁸⁸

- Land Redistribution

Like many other provisions in the Bill of Rights, section 25(5) of the Constitution acknowledges that the state has an obligation to take reasonable measures (including but not limited to legislative measures) within its available resources to enable equitable access to land for all citizens.¹⁸⁹ This Constitutional mandate is in direct acknowledgement of South Africa's past, where injustices against certain sections of the population were entrenched by and protected in law. The systematic exclusion of black South Africans from land ownership can be traced through the colonial era and into apartheid. It is in recognition of this historical imbalance that section 25(5) instructs the state as it does. In an attempt to 'foster conditions' that will allow for equitable access to land the democratic government has undertaken a programme of land redistribution.¹⁹⁰

- Tenure Reform

The Constitution addresses particular forms of injustice that impact upon who has access to land, and whose land rights are visible and protected in law. While section 25(5) deals with the more general concept of land redistribution, section 25(6) deals specifically with persons and communities whose tenure was made insecure through 'past racially discriminatory laws'. This particular section of the Property Clause requires that, in its actions to provide tenure which is secure or comparable redress, the state must be guided by an Act of Parliament. It is notable that section 25(6) is the only section in the Property Clause that is backed by an additional, self-standing section that instructs Parliament to pass the legislation referred to in that subsection. The other subsections that require an Act of Parliament to be passed are – it could be argued – covered by section 25(5), which directs the state to take reasonable

¹⁸⁸ Constitution of Republic of South Africa, 1996 section 25.

¹⁸⁹ Constitution of Republic of South Africa, 1996 section 25(5).

¹⁹⁰ 'Land Reform must be in line with the Constitution: Zuma' *TimesLive* 27 June 2011 available at: <https://www.timeslive.co.za/news/south-africa/2011-06-27-land-reform-must-be-in-line-with-constitution-zuma/> accessed on 22 July 2017 see also: Andisiwe Makinana 'Land reform: Zuma moves for expropriation with no compensation' *City Press* 31 March 2017 available at: <http://citypress.news24.com/News/land-reform-zuma-moves-for-expropriation-with-no-compensation-20170331> accessed on 22 July 2017.

measures including legislative measures to ensure equitable access to land. Section 25(9) refers specifically to the legislation referenced in 25(6).

As will be discussed in more detail below, when it comes to securing tenure in the former bantustans, Parliament has passed interim legislation in the form of the Interim Protection of Informal Land Rights Act 31 of 1996, but has yet to replace this with a more robust, permanent Act of Parliament. It has made an attempt to pass the legislation referred in subsection 9, but the Communal Land Rights Act 11 of 2004 was severely criticised by rural communities as being a mechanism for bolstering the power of traditional authorities over land.¹⁹¹ The Act was ultimately struck down by the Constitutional Court on procedural grounds.¹⁹² Currently the important aims of section 25(6), as they relate to occupants of the former bantustans, remain unfulfilled as the interim legislation mostly offers protections from deprivations without consent, as opposed to mechanisms for tenure reform. Thus, the tenure of many South Africans living in the former Bantustans remains insecure.¹⁹³

- Land Restitution

South Africa's history of dispossession requires that particular focus be given to measures to restore what was taken from individuals and communities affected by processes of dispossession and displacement. Section 25(7) of the Property Clause attempts to address this very issue by providing for restitution of property for those who were dispossessed after the 19 June 1913. This cut-off date may appear random, but does in fact carry historical significance as it is the date of the enactment of the infamous Natives Land Act of 1913.¹⁹⁴ As discussed above, this Act was instrumental in building on and further entrenching the dispossession of many black communities that had started under early colonial settlement. There are differing opinions on whether the cut-off date captured in the Constitution is

¹⁹¹ Janet Love 'Foreword' in Aninka Claassens and Ben Cousins (eds) *Land Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) xii – xv.

¹⁹² *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

¹⁹³ It should be noted that in fulfilment of Section 25(6) Parliament has also passed the Extension of Security of Tenure Act 62 of 1997 (commonly known as ESTA). This Act deals with the rights of occupiers and their relationship and rights as against those of the owner or person in charge. In the main ESTA is used to secure the rights of farmworkers and others living on land that they do not own. ESTA does not deal with indigenous tenure rights or customary law rights to land that are akin to ownership. Thus it could be argued that ESTA only partly completes the s25(6) mandate.

¹⁹⁴ Refer to the discussion in the earlier part of this chapter.

appropriate given that dispossession occurred prior to the enactment of the 1913 Land Act.¹⁹⁵ For now this debate remains unresolved and the 19 June 1913 cut-off date remains part of the legal requirements needed to prove a valid claim for land restitution or comparable redress.¹⁹⁶

In October 2013 the Department of Rural Development and Land Reform (DRDLR) tabled before Parliament the Restitution of Land Rights Amendment Bill [B35A-2013]. In the main, this Bill sought to re-open the land claims process until 2019, with the first opportunity to submit land claims having closed in 1998, after being open for a four- year period. The Amendment Bill was passed and signed into law in June 2014, in spite of the fact that many land claims from the previous process still remained unresolved more than ten years later.¹⁹⁷ A variety of civil society voices objected to the Amendment Act and the false hope that it offered in a context where the preceding restitution process was in disarray.¹⁹⁸ In response to the enactment of the Restitution of Land Rights Amendment Act 15 of 2014, the Land Access Movement of South Africa (LAMOSA) together with other community-based organisations took Parliament and the provincial legislatures to the Constitutional Court.¹⁹⁹ LAMOSA asked the court to declare the Amendment Act unconstitutional, citing an inadequate public participation process and the absence of a sufficient mechanism for ring-fencing land claims already in the system from interference or delay as a result of new claims lodged during the re-opening. The Constitutional Court found that the Act was invalid on the basis of the flawed public participation process followed by Parliament. The re-opened restitution process has been put on

¹⁹⁵ There is much debate about the appropriateness of this cut-off date see here: Land and Accountability Research Centre 'Restitution of Land Rights Amendment Act' available here: <http://www.customcontested.co.za/laws-and-policies/restitution-land-rights-amendment-bill/> ACCESSED 22 July 2017; Gaye Davis '1913 cut-off date for land claims should be pushed back' March 2016 available here: <http://ewn.co.za/2016/03/03/1913-cut-off-date-for-land-claims-should-be-pushed-back> accessed on 22 July 2017.

¹⁹⁶ Restitution of Land Rights Act 22 of 1994 section 2.

¹⁹⁷ Tara Weinberg, *The Contested Status of Communal Land Tenure in South Africa*, PLAAS Rural Status Report 3 (2015).

¹⁹⁸ Land and Accountability Research Centre 'Restitution of Land Rights Amendment Act' available here: <http://www.customcontested.co.za/laws-and-policies/restitution-land-rights-amendment-bill/> accessed on 22 July 2017.

¹⁹⁹ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC).

ice and the Constitutional Court has interdicted the Commission on the Restitution of Land Rights from processing any claims lodged after the 2014 re-opening date.²⁰⁰

Legislation protecting informal land rights on communal land

Interim Protection of Informal Land Rights Act

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) was intended to be an interim measure to fill the gap until permanent legislation offering protection to informal land rights was passed.²⁰¹ Given that Parliament has yet to pass such permanent legislation IPILRA remains in force, although, due to its interim nature, the Act must be renewed annually.²⁰² IPILRA offers protection against infringements on informal land rights, and is most effective as a defence mechanism for holders of rights recognised as informal.

The Act provides an extensive and broad definition of informal rights to land, thus allowing it to offer protection to a wide range of rights holders. Under IPILRA, “informal rights in land” refer to:

- (a) the use of, occupation of, or access to land in terms of
 - (i) any tribal, customary or indigenous law or practice of a tribe;
 - (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in
 - (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
 - (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or

²⁰⁰ In 2017 a new Restitution of Land Rights Amendment Bill [B19-2017] was made public. Its stated aims are the same as the previous Bill. The 2017 Bill can be viewed here: <http://www.polity.org.za/article/restitution-of-land-rights-amendment-bill-b19-2017-2017-08-24> accessed 4 November 2017.

²⁰¹ The Acts objective clause reads: ‘To provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters connected therewith.’

²⁰² Act 31 of 1996 section 5.

- (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;
- (b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;
- (c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or
- (d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question.²⁰³

Section 2(1) of IPILRA provides that an individual may not be deprived of their 'informal rights to land' unless they consent to such deprivation. This section goes on to lay out the processes for deprivation of a right where the land is held on a communal basis. In this instance, an individual may only be deprived of their right in a manner that is in accordance with community custom and usage. In the instance of deprivation as a result of disposal (sale) of land or a right in land the community will be required to provide appropriate compensation to the individual deprived of their rights.²⁰⁴ In section 2(4) the Act requires that the decision to deprive an individual of an informal right in land be taken by a majority of those who hold the same type of rights as the person being deprived. The procedure for such a decision to be taken is also specified in the Act. It includes that the decision be taken at a meeting convened in accordance with certain specifications. These include that there be adequate notice of the meeting and that those attending be afforded a reasonable opportunity to participate.²⁰⁵

²⁰³ Act 31 of 1996 section 1(1).

²⁰⁴ Act 31 of 1996 section 2(2) and (3).

²⁰⁵ Act 31 of 1996 section 2(4).

While it is an important piece of legislation, the Act does have some shortcomings. It offers minimal protection against deprivation only.²⁰⁶ For communities or individuals to rely on it, they must first be threatened with deprivation of a land right. It also does not provide mechanisms for reforming insecure tenure as envisaged by the Constitution.²⁰⁷ These shortcomings are not surprising. Given that IPILRA was always intended to be an interim piece of legislation with a relatively short life span, and that the regulations, which could have offered a way to flesh out the Act, have never been developed.²⁰⁸

Perhaps the worst shortcoming is that IPILRA is a little-known piece of legislation, and most rural communities who could benefit from its protection are not aware of its existence. There has been no continuing effort on the part of the state to educate communities on the existence of IPILRA or its protections. In a context where there is as yet no permanent Act that fully addresses the Constitutional aims of section 25(6), it is unfortunate that communities are unaware of IPILRA. Given the fact that there is an increasing number of rural communities facing dispossession at the hands of mining companies and other development initiatives, IPILRA is becoming an increasingly important piece of legislation.²⁰⁹ It is effectively the only stop gap available until Parliament passes permanent legislation aimed at giving effect to section 25(6) for communities in the former homelands. However, when compared to the attempts made by the state, through its Department of Rural Development and Land Reform (DRDLR), discussed below, IPILRA offers the potential for somewhat more considered protections.

Communal Land Rights Act

The Communal Land Rights Act 11 of 2004 (CLRA) was the first attempt at drafting the comprehensive legislation required by section 25(6) of the Constitution. Passed in 2004, the Act faced stiff opposition during its passage through Parliament, with a number of civil society groups raising questions about the constitutionality of the Bill. Although it was passed by Parliament, the CLRA was never implemented as it was

²⁰⁶ Act 31 of 1996 section 2.

²⁰⁷ Land and Accountability Research Centre 'Protecting the Land Rights of Rural People: Is IPILRA the Answer?' (2016) *People's Law Journal* 69.

²⁰⁸ Note 207 above.

²⁰⁹ Land and Accountability Research Centre 'They are Robbing Us: How Mining is Affecting the Residents of Makhasaneni' (2016) *People's Law Journal* 62.

subject to legal challenge by rural communities and ultimately struck down by the Constitutional Court. The primary concern of the litigant communities, and many other rural communities, was that the CLRA would undermine their tenure security by granting sweeping powers to traditional leaders and councils. The Act provided for traditional councils to act as 'land administration committees'.²¹⁰ Included in the powers the CLRA gave to traditional authorities was control over occupation, use and management of communal land.²¹¹

The legal challenge to the CLRA made its way through the lower courts first and, in October 2008, the North Gauteng High Court declared fifteen fundamental provisions of the CLRA invalid and unconstitutional.²¹² These included provisions governing the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees.²¹³ In the High Court, the decision was rooted in the substantive arguments presented against the Act.²¹⁴ In the Constitutional Court, however, the decision was founded in the procedural arguments presented, which made the substantive arguments moot.²¹⁵ In its judgment in *Tongoane* the Court struck down the CLRA in its entirety on the basis that the incorrect public consultation process had been followed in its journey through Parliament.²¹⁶ Even though the Court did not engage with the substantive issues, the size and spread of the public outcry against the CLRA, especially from rural communities, sent a clear message to legislators about how rural communities feel about traditional authorities being given extensive powers over land administration.²¹⁷ A more detailed look at some of the substantive issues follows.

²¹⁰ Act 11 of 2004 section 21(2).

²¹¹ Act 11 of 2004 section 21.

²¹² *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 838 (GNP) at para 67.

²¹³ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 838 (GNP) at para 4.

²¹⁴ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 838 (GNP) at para 67.

²¹⁵ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC).

²¹⁶ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) at para 133.

²¹⁷ Land and Accountability Research Centre 'Centralisation without Consent: Communal Land Rights are under threat' (2016) *People's Law Journal* 47.

The CLRA would have provided for the 'transfer of title' over communal land to communities subject to various conditions.²¹⁸ For title to be transferred to them, the community would be required to draw up and register a set of tenure rules.²¹⁹ The community would also need to survey and register the 'community' boundaries and subject all the residents of the community to a rights enquiry to investigate the nature and extent of the existing rights and interests in land.²²⁰

The Act created 'land administration committees' to 'enforce rules and exert ownership powers on behalf of the "community"'. Section 21(2) of the CLRA provided that traditional councils that are recognised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 'may' act as land administration committees. There was considerable uncertainty as to whether communities could in fact choose which entity acted as the land administration committee. The then Department of Land Affairs, on the one hand, claimed that communities could choose between their traditional council or some other entity.²²¹ The Department of Provincial and Local Government, on the other hand, claimed that where traditional councils existed, they would automatically become the land administration committees. Confusion around this issue was compounded by the fact that the CLRA failed to provide a clear set of procedures for how a community could make such a choice.²²²

Had the CLRA been implemented it would have granted considerable power over land administration to traditional leaders and traditional councils, while significantly undermining the tenure security of communities living on communal land. The formulation and structure envisaged by the CLRA seemed to assume that the relationship between communities and their traditional authorities was always a good one. The evidence of the four communities that brought the challenge against the Act showed that in fact there is variation across areas.

A consequence of the Act would also have been to grant traditional leaders and councils extensive powers over land in a manner that was inconsistent with

²¹⁸ Act 11 of 2004 ss 6 and 18.

²¹⁹ Act 11 of 2004 section 19.

²²⁰ Act 11 of 2004 section 14.

²²¹ Ben Cousins and Ruth Hall, *Rights without Illusions: The Potentials and Limits of Rights-based Approaches to Securing Land Tenure in Rural South Africa*, PLAAS Working Paper No 18 (2011) at 9.

²²² Act 11 of 2004 Chapter 7 dealing with Land Administration Committees.

customary law and local indigenous accountability structures.²²³ This would have made it challenging for ordinary people to hold their traditional leaders to account. It has been argued that the powers that the CLRA would have given traditional authorities would have far exceeded the types of powers these structures had enjoyed under customary law.²²⁴

Communal Land Tenure Policy

Published in 2014 by the Department of Rural Development and Land Reform, the Communal Land Tenure Policy (CLTP) was the precursor and guide for another attempt at passing legislation to secure and reform communal tenure.²²⁵ According to the formulation in the CLTP there would be a single title for the 'outer boundary' held by a single title holder, who the CLTP describes as the 'governance structure'.²²⁶ The policy document goes on to explain that in areas where there are traditional councils, as created by the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), these councils would be the title holder. The CLTP assigns to the title holder the responsibility to adjudicate disputes on land allocation and use and to take responsibility for land allocation.²²⁷ In essence then, like the CLRA before it, the policy proposes transferring the outer boundaries of tribal land in communal areas to traditional councils. Critics of this formulation point out that the traditional councils are themselves problematic governance structures, not least because many are not compliant with the composition requirements set out in the TLGFA.²²⁸ The problems with traditional councils and the challenges these present are further unpacked under the discussion on the TLGFA below.

The model for the division of land rights envisaged in the CLTP allocates 'institutional use rights' to individuals or families who occupy and use communal land.²²⁹ Given

²²³ Ben Cousins and Ruth Hall, *Rights without Illusions: The Potentials and Limits of Rights-based Approaches to Securing Land Tenure in Rural South Africa*, PLAAS Working Paper No 18 (2011).

²²⁴ Aninka Claassens 'Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008).

²²⁵ A copy of the Communal Land Tenure Policy of August 2013 is available here: <http://www.customcontested.co.za/wp-content/uploads/2013/11/06-AUG-2013-Communal-Land-Tenure-Policy-v2.pdf> accessed: 22 July 2017.

²²⁶ Weinberg note 197 above.

²²⁷ Communal Land Tenure Policy of August 2013 at 17 – 19.

²²⁸ Weinberg note 197 above.

²²⁹ Weinberg note 197 above.

that ownership would vest in traditional councils or another governance structure, the 'institutional use rights' granted to individuals and families could be trumped by the rights of the title holder (whether a traditional council or other governing structure).²³⁰ In theory, the CLTP proposal also provides for Communal Property Associations (CPAs) or Trusts to own land titles, where there are no traditional councils. However, the CLTP and the Department's Draft Policy Paper on CPAs indicate that no new CPAs will be established in areas where traditional councils exist.²³¹ As traditional councils exist wall-to-wall in the former homelands, the government's new policy could effectively put an end to the institution of CPAs.²³² Finally, not only does the schema established by the policy give primacy to traditional authorities, but it makes no provision for individuals and household to hold traditional councils accountable for their decisions.²³³

Communal Land Tenure Bill

The Communal Land Tenure Bill of 2017 (CLTB) was published for comment on the 7 July 2017.²³⁴ It is the most recent attempt by government to create legislation that regulates communal land and provides security of tenure for those with historically insecure tenure, thereby fulfilling the state's obligations under section 25(6) of the Constitution. The Bill envisages the possibility of community or individual ownership with an administrative role for a structure chosen by the community.²³⁵

Clause 28 of the Bill provides that communities that have been issued with a deed of communal land must choose an entity to manage and administer the land owned by the community. The choice is between a traditional council, a Communal Property Association (CPA) or 'any other entity as approved by the Minister'.²³⁶ The challenge here is two-fold: firstly, the Bill stipulates that only legally compliant traditional councils and CPAs may be chosen to act as the land administration entity.²³⁷

Traditional councils need to comply with the composition and election requirements

²³⁰ Communal Land Tenure Policy of August 2013 at 19 – 21.

²³¹ Weinberg note 197 above.

²³² Communal Land Tenure Policy of August 2013 at 22.

²³³ Weinberg note 197 above.

²³⁴ Communal Land Tenure Bill, 2017 and Explanatory Memorandum.

²³⁵ Communal Land Tenure Bill of 2017 Clause 18.

²³⁶ Communal Land Tenure Bill of 2017 Clause 28.

²³⁷ Communal Land Tenure Bill of 2017 Clause 28(4).

set out in the Traditional Leadership and Governance Framework Act.²³⁸ CPAs must be registered with the Department, in compliance with the Communal Property Association Act 28 of 1996.²³⁹ Research has shown that very few councils have actually complied with these requirements and many CPAs struggle to be registered.²⁴⁰ The Bill formally presents only two options for communities with no clearly conceived alternative in instances where neither a CPA nor a traditional council are an option. In light of how the state has struggled to support and hold to account both CPAs and traditional councils, it could be argued that the Bill cynically offers communities two flawed options. Given the time it has taken and the time it would take for these structures to become compliant, there is a question as to what happens to the communities' ability to choose a management entity in the interim. The Bill does not clearly provide for an interim measure, should the communities' traditional council or CPA not be legally compliant. Secondly, neither of these structures have a strong track record of being inclusive of women. Community experience shows that women who are on these Councils are subjected to numerous challenges.²⁴¹ Interestingly, on the issue of the representivity of the institutions involved in the proposed model, the CLTB creates household forums that are subject to a 50 per cent gender split.²⁴² Not only is this higher than what is required of traditional councils, but the Bill also requires that these forums have specific members to represent vulnerable groups, such as women, children and people with disabilities.²⁴³ These forums oversee the management and administration role being carried out by the institution chosen, as per clause 28.²⁴⁴ Given that these forums are more representative institutions, it is interesting that they are not offered as an option alongside traditional councils and CPAs in the choice of administrative institutions in clause 28.

²³⁸ Traditional Leadership and Governance Framework Act of 2003 section 3.

²³⁹ Communal Property Associations Act 28 of 1996 ss 5 and 6.

²⁴⁰ Tara Weinberg, *The Contested Status of Communal Land Tenure in South Africa*, PLAAS Rural Status Report 3 (2015).

²⁴¹ Pearlie Joubert 'Womens Minister whacks Chiefs Bill' 22 September *City Press* available here: <https://www.news24.com/Archives/City-Press/Womens-minister-whacks-chiefs-bill-20150430> accessed on 4 November 2017.

²⁴² Communal Land Tenure Bill of 2017 Clause 33(3).

²⁴³ Communal Land Tenure Bill of 2017 Clause 33(3) and (4).

²⁴⁴ Communal Land Tenure Bill of 2017 Clause 35(1).

There are other aspects of the schema proposed by the Bill to be foregrounded here. First is the model that the Bill adopts, in which there is one registered owner for land allocated to an individual for residential and other purposes. This model raises questions about the management and upkeep of the register and the implications for secondary rights, specifically women's rights.²⁴⁵ The second is that the functions of the land administration institution, as laid out in clause 29(1)(f) and (g), are rather nebulous and broad. In their current articulation, they raise questions as to how and through what processes the community delegates other functions to the land administration institution. Alongside that question is one related to how communities or officials can prevent a situation where land administrators claim authority over issues not delegated to them, thereby overreaching under the guise of a delegation under clause 29(1). It is possible that this may be addressed through regulations as provided for under clause 50 of the Bill, but insofar as the Bill does not lay this out it leaves itself open to criticism.

In reference to decision-making processes the CLTB sets 60 per cent as the minimum threshold. This means decision-making about land related issues requires that a resolution be supported by 60 per cent of the households in a specific 'community'. Clause 13(a) of the Bill provides that communal land cannot be sold, donated, leased, encumbered or otherwise disposed of unless this is supported by a written resolution supported by 60 per cent of households in the community. These clauses are problematic as they do not differentiate between different types of right holders. For example, some people will have the right to access the land, while others will have the right to occupy the land. The interests of these rights holders are different and should be treated differently in the decision-making process.²⁴⁶ An undifferentiated threshold of 60 per cent does not necessarily ensure that the voices of vulnerable groups, like women, will be appropriately consulted and accurately reflected in the resolution.

Traditional Leadership and Land Administration

Traditional Leadership and Governance Framework Act

²⁴⁵ The challenges related to women's rights being considered secondary are elaborated on in the discussion in Chapter 6.

²⁴⁶ Communal Land Tenure Bill of 2017 clause 13(a).

The Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act or TLGFA) establishes, as the name suggests, a national framework. It contains provisions dealing with various aspects of the institution of traditional leadership and the governance of traditional communities. These include definitions for various leadership positions and governance structures, requirements for recognition, and guidance as to the scope of the authority of traditional leaders, namely their roles and functions.²⁴⁷ There is some debate as to whether the state, through its Department of Cooperative Governance and Traditional Affairs, is the correct actor to be making these determinations.²⁴⁸ Critics of the Framework Act argue that empowering the state to make these determinations interferes with the relationship of accountability between traditional leaders and the community. They assert that these determinations should be guided by the community.²⁴⁹ In contrast, traditional leaders are seeking a larger role in South Africa's governance structure than the one envisaged for them in the Framework Act.²⁵⁰

In this overview I focus primarily on section 20 of the Framework Act as this is the provision that empowers national and provincial governments to determine the roles and functions of traditional leaders.²⁵¹ The Act provides a long list of areas within

²⁴⁷ The Traditional Leadership and Governance Framework Act objectives paragraph reads as follows: To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.

²⁴⁸ Land and Accountability Research Centre 'Submission on the Traditional and Khoi-San Leadership Bill, 2015' available here: http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf accessed on 22 July 2017.

²⁴⁹ Land and Accountability Research Centre 'Submission on the Traditional and Khoi-San Leadership Bill, 2015' at 3 – 6.

²⁵⁰ Andisiwe Makinana 'Give Chiefs more Power' 19 March 2017 *City Press* available here: <https://www.news24.com/SouthAfrica/News/give-chiefs-more-power-20170318> accessed on 3 January 2018, 'Chiefs want more money, greater power' 20 March 2017 *HeraldLIVE* available here: <http://www.heraldlive.co.za/politics/2017/03/20/chiefs-want-money-greater-power/> accessed on 3 January 2018.

²⁵¹ Guiding principles for allocation of roles and functions

Section 20(1) National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of-

- (a) arts and culture;
- (b) land administration;
- (c) agriculture;
- (d) health;

which national and provincial government may provide a role for traditional councils and traditional leaders. Included in this closed list is land administration. This means that through legislative measures government may provide a role for traditional councils or leaders in the administration of land.²⁵²

It is useful for purposes of this discussion to note the following about traditional councils. These councils are governance structures created by the TLGFA. The Act requires that once a traditional community has been recognised as such, it must establish a traditional council in accordance with the composition requirements set out in section 3 of the Framework Act. These requirements are that a council must be made up of traditional leaders and members of the community selected by the traditional leader. One-third of the council must be women. It must also include members of the community who have been democratically elected to the council, making up 40 per cent of the council.²⁵³ These composition requirements were included in the Act to counterbalance the fact that section 28 of the TLGFA allows for tribal authorities – governance bodies created by apartheid legislation – to be deemed to be traditional councils, provided that they meet the composition requirements within a stipulated timeframe.²⁵⁴ Research on the level of compliance of these traditional council's shows that many of them have not successfully met the composition requirements, calling their legal status into question.²⁵⁵ The Communal Land Rights Act was an attempt to create, through national legislation, this role in

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- (e) welfare;
 - (f) the administration of justice;
 - (g) safety and security;
 - (h) the registration of births, deaths and customary marriages;
 - (i) economic development
 - (j) environment;
 - (k) tourism;
 - (l) disaster management;
 - (m) the management of natural resources; and
 - (n) the dissemination of information relating to government policies and programmes.

²⁵² The Act stipulates that National or Provincial government may 'through legislative or other measures' provide a role for traditional councils or leaders. It is unclear what exactly is meant by 'other measures' but some researchers have interpreted one possible meaning to be delegation. This murkiness raises questions about how traditional communities will know what roles and functions have been assigned to traditional councils and leaders.

²⁵³ Act 41 of 2003 Section 3(2).

²⁵⁴ Act 41 of 2003 Section 28(4).

²⁵⁵ Land and Accountability Research Centre 'Submission on the Traditional Leadership and Governance Framework Amendment Bill, 2017' available here:

http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission_TLGFA%20Amendment_LARC_20170605%20Final.pdf accessed on 4 November 2017.

land administration for traditional governance structures. The Communal Land Tenure Bill of 2017 will be the most recent attempt to do this.

Conclusion

This chapter has traced the development and application of laws regulating black people's relationship to land in South Africa. It has shown how law has been instrumental in shaping the history of land rights in South Africa in both positive and negative ways. My intention with this discussion has been to draw attention to some of the key instruments used to define and demarcate the land rights of black South Africans, particularly those living in the former bantustans. I have done this in order to centralise the question of how law has been used to regulate and frame people's relationships to land both in the past and in the present. It is important that the discussion place old-order laws alongside those of the present so as to sharpen questions around unintended replications and patterns. As much as possible I have tried to foreground the particular implications that these laws had and will have for women, although this discussion is picked up elsewhere.

Tracing at least part of the story of land rights as told through legal instruments and policy interventions, allows us to consider questions related to the progression and development of land laws. Are the responsible departments managing to make fundamental departures from painful legacies or do our laws still associate too closely with characterisations of the past? A firm and fair departure from the approaches of the Natives Land Acts is central to being able to fulfil the Constitutional obligation laid out in section 25(6). I am certainly not asserting that such a departure has not taken place, because it has, but do our legal instruments, both enacted and proposed, carry that into the everyday experiences of rural South Africans? It would seem that, for a number of reasons, the answer is, 'not quite yet'.

Chapter Five

In their own words – discussion of findings

Introduction

The customary land rights of people living in the former Bantustans are underpinned by a network of values and relationships. Speaking to rural women about their lived experiences gives a sense of their understanding of these values and relationships. It also gives a sense of how they navigate and draw on these values and relationships in framing their claims to residential land. The interviews that I did with a select group of women from Cata and Rabula reveal a number of broad themes in these women's experiences of navigating the values and relationships that underpin and shape their customary land rights. These themes centre on: a) notions of independence, including nuanced understandings of individual/community relationships; and the related theme of b) harmonious family relationships and expressions of belonging. This discussion unpacks these themes and the ways in which they speak to how the women who were interviewed explained and experienced 'changes' in relation to women's ability to access to land. This chapter provides my reading of the ways in which a group of ten women in Cata and Rabula, who have gained access to residential land contrary to prevailing conceptions of established customary law, navigate their way through concepts of independence, individualism and communalism and family relationships as they assert their rights to land, and specifically to residential plots held in their own names.

In the descriptions of their experiences of obtaining a residential site or recounting how they came to be living on the land that they were living on, women spoke about the ability and importance of being independent. The isiXhosa term that all of them used was *ukuzimela*. A more direct translation of this word is: to stand on your own, a term that is in many ways synonymous with the English term "independence". Though their life experiences differed the value that women placed on independence surfaced repeatedly.

Independence, Family relationships and Community – exploring these as complementary

While all of the women spoke about and used the term *ukuzimela*, it was interesting to note the manner in which they spoke it and the terms within which they cast it. Ms. M had survived and left a violent and turbulent marriage and had managed to craft a life for herself through reliance on her own abilities. Her statements on the concept of independence put forward an understanding that could be said to have developed through experiences of hardship.

Ms. M: [By ukuzimela] I mean to be independent, to have the sole responsibility. So in my case I am educating my children, providing for them, I purchase cattle or goats. I am responsible for my own growth.

Interviewer: Why do you see this (ukuzimela) to be such an important thing?

Ms. M: It is important to be independent so that you are not dependent on others. So that I am not dependent on being given things by others because if you fall out with them then they can take their things back and then you have nothing. It's about being able to do it for yourself, to know that you have been educated and now you have a job and if you see something in someone's house you can go buy it for yourself you don't have to ask for it.

As one of the comparatively younger woman, her understandings of independence are strongly coloured by her own experiences and therefore seemed to focus on an inward-looking, self-empowerment conception of independence. Independence as control over your life, and control over yourself in relation to others, was most clearly exemplified by not being dependent on others. Given Ms. M's experiences at the hands of an abusive husband it is perhaps not surprising that her conceptions of *ukuzimela* look the way that they do. Her lived experience of extreme vulnerability undoubtedly colours her articulation, which hints at independence as an embodiment of strength.

It is interesting to look at this conception of independence alongside the articulations by some of the older widows that were interviewed. Mrs. M, Mrs. H, Mrs. G and Mrs. P all spoke of independence in relation to how it interacts with family relations, again no doubt strongly influenced by their own lived experiences. These older women refer to the difficulties and tensions inherent in living with siblings and their families, especially when you then have children of your own. Independence is not only

something to be encouraged by and within families, but it is also presented as something to strive for, taking on an aspirational element. In their opinion, being independent contributes towards improving family relations by allowing siblings to live apart, while also allowing individual family members to have control over their own development as people, both in relation to material gains and socialisation. The vignettes below describe this orientation in the words of the women I interviewed:

Mrs. G: Being independent [ukuzimela] is a very good thing. Because you are in control of what you do, you can think to do something and then you can do it without being afraid that maybe this person that I am dependant on may not like this thing. When you are independent you can do what you wish to do, you are free when you are independent and I think that is a good thing for the community. Your children are happy, they live in peace...being independent is a pleasant thing especially if you have your own children. It is not nice to live at home with your brothers if they have their children and you have your children and he has a wife and you and your children are under them. It is better ukuzimela.

Mrs. H: My story is that my husband died and I decided to leave his family home and come and live at my parents' home. My parents then died and I decided that because I had children I should establish my own home. Because when you live with people and you have children, your children live uncomfortably and there is much bickering. So I decided to be independent and establish a home with my children to distance myself from conflict your children will be told they are not children of this home. So to avoid this I decided to establish my own home. In order to avoid conflict, because once your parents die your children will be subjected to a difficult life of being taunted and told their father is dead they do not belong to this home. So I wanted to avoid that and that's how I took the decision to move.

Mrs. M: ...You see if there are four children in a family there will be one amongst them who will be like my son, who will always cause trouble and

disrupt the others. If you are one of the ones who are trying to improve yourself then your efforts will be interrupted by this one. You will buy this glass and he will sell it. But if you have your own house then the key is with you, you can lock it up. I see this as something good and I encourage it. Children must identify the disruptive one in the family and make a way to do their own thing. It is better for you who has the means to go and build your own home. Kicking the disruptive one out of the family home only means that they could come and cause trouble elsewhere. But if you have your place then you can prevent that, you can keep them out. You can say to them you cannot enter my home, rather build your own home. But all of you are still entitled to come to the family home. This happens amongst children even though they are of the same parents. The ones with dignity and good sense will leave and establish themselves elsewhere.

Mrs. P: My life is good now that I live outside the family home with my children. It has changed in a good way, because in your husband's family home (emzini) there are many things that cause problems/ trouble. Others will treat your child badly and that will trouble you.

Woman 3 in focus group: This used to happen in the 'old days' because if you had children out of wedlock and I as your mother had sons. My sons would grow up and marry and have families and one of them would take over this homestead. This means that you (as my daughter) would not really have a place to stay (here at in my homestead) for you and your children. So as a family we would discuss this, and you would express your desire to establish yourself and a place for you to live would be found and you would live there.

Woman 1 in the focus group: The conflict that I was referring to is when families live in one place/ occupy one homestead they are prone to conflicts as a family. Therefore, when one person chooses to move out and seek their own site this is a good thing as it soothes some of those conflicts.

Ms. M describes independence from a slightly more individualistic perspective, *ukuzimela* as something that benefits, strengthens and assists the individual. The older women (Mrs. M, Mrs. G, Mrs. H and Mrs. P and some of the women from the focus group) describe it as something good for families, which can alleviate family tension and, by so doing, keep family relationships strong. The replies from the older women point to an underlying concern for the maintenance of family relationships across generations, not only between themselves and their siblings and family members, but also relationships between the children (both their own and those of other family members). Mrs. M in particular refers to *ukuzimela* as an option to be used by children of the same home in alleviating tensions between them. She also points out that independently establishing oneself elsewhere does not alter your relationship with the family home. The choice to secure oneself does not interfere with customary notions of belonging. Her response conjures up images of the family home as the centre, out from which relatives move into the world, but it remains a place to which they belong and to which they can return.

The responses from the women I spoke to support existing research about how family is understood in these customary communities, and also speak to the changing nature of family. The traditional idea of nuclear families has never fitted well into customary African settings with extended families. Family structures are further diversifying as marriage rates in these communities continue to decline.²⁵⁶ The articulations used by these women speak back to ideas of harmonious extended families all occupying the same plot of land, by injecting lived reality into the picture. This is the reality that family relationships too can be difficult and fraught. This reality is not just a trigger for the need for change it also informs the way in which women in Cata and Rabula understand their relationship to land. The articulation that emerges from the interviews maintains the connection between land and family even as the concept of family changes. Unmarried or widowed sisters and daughters are finding

²⁵⁶ Aninka Claassens and Dee Smythe 'Marriage, land and custom: what's law got to do with it?' (2013) *Acta Juridica* 1.

a way to preserve family relationships while establishing a home of their own that allows them to stand on their own.

What is clear in both of these articulations is the fact that there is no conflict between independence as a pursuit for individual benefit (being independent because you get to control your own development) and the pursuit of independence for the benefit of the family or wider community - becoming independent so that you don't have to live under your brother's roof with the ever-present potential for conflict. What the women quoted above are describing is not a choice between independence for the self or for the family. Nor are they describing contradictory conceptions of independence.

Rather they are describing one conception of independence, namely the ability to be self-sufficient, to be able to stand in the role of provider for you and your own. They are also describing the various ways in which independence, once obtained, can be used. The clearest use for me is that independence is a tool for strengthening and improving, whether it is yourself and your children or your family and those relationships. What the descriptions and explanations given by the women I spoke to tell me is that independence or being independent is something that contributes to society or community at a larger level by building upwards and outwards from a lower or more localised level. This could be articulated in the following way: an individual capable of being independent is a stronger and improved individual. That individual does not however exist in a vacuum and their ability to strengthen and improve themselves translates into an ability to contribute towards strengthening and improving their family (immediate and extended). This produces a ripple effect, where families strengthened through better relations, less conflict and shared priorities contribute towards a stronger clan, community, and village. What I am describing is a possible unpacking of the overarching notion of *ubuntu* through a particular articulation, namely the isiXhosa saying '*umntu ngumntu ngabantu*' (direct translation: a person is a person through other people). While I am cautious not to romanticise these practices, especially because to do so would be irresponsible in a context of such poverty and inequality, I would contend that in communities where values related to interdependent ways of living and being are subscribed to, there is no inherent tension between the individual and the community. Communities benefit from 'strong' individuals (based on the idea that those individuals will find ways to 'strengthen' their communities). So, there is no tension between an individual

wanting to improve themselves and be able to be independent and that individual being part of a community. In fact, the older women are describing how independence and community interact, albeit at the first more intimate level of community, namely family.

Independence conjures up images of people pulling in different directions and away from 'the centre' and possibly away from each other. In this context however, this is not necessarily the case. Here the individual is encouraged to pull in their own direction and away from 'the centre' in order to grow and build themselves. But they never truly leave 'the centre' (family/community). This is because it is intimately linked to who they are or become, in that it is the space within which their independence is shaped. If communities are viewed as structures made up of a number of component parts, then it could be said that the most basic component is the individual. The next 'level' up would be the family and on the next level up from families are groupings like clans and neighbourhoods – these groupings then make up the community. An understanding of independence or notions of *ukuzimela* as something that contributes towards the development and improvement of the various components that make a community means that it is not necessarily contrary to notions of community belonging. The *abantu* (people) feature in the 'shaping' of an *umntu* (a person), but it is worth noting that, in the expression, it is the word *umntu* that is mentioned first, as if the individual were the basic unit at the heart of a phrase often used to describe interdependence.²⁵⁷

The approach of the legal interventions is premised on securing the individual and the collective, but gives no indication of how that approach is to navigate the nuances indicated by the responses of this group of women in the Eastern Cape. For some rural communities, developmental initiatives like mining and the building of highways and toll roads places severe strain on the relationship between an individual(s) and their community. In these communities, people experience these development projects as a struggle between certain individuals wanting to protect their land rights pitted against those in the community who are in support of the

²⁵⁷ There is however an unknown element here because, for the purposes of answering this research question, the women were not asked about disputes or conflict situations. It would interesting and of value to know how an articulation of the individual and the collective, that does not centre wholly around choice or choosing one over the other, would play out in a dispute or where there is conflict.

development project. The ability to navigate this tension (and perhaps even a partial cause of such tension) is hindered by a blunt understanding of the relationship between the individual and the collective or community. In thinking about how to secure individuals like Ms. M, Mrs. G, Mrs. H and others, their own words tell us that a nuanced understanding of the relationship between the individual and the collective is important. It also seems to me that if we can consider ways to engage with this dynamic at the rather challenging level of family relationship, it could provide insights for navigation at a larger level.

The overarching principle that a strong, secure individual is beneficial to a community aligns well with an understanding of rights that follows Jennifer Nedelsky's conception of rights as relational.²⁵⁸ Notions of *ubuntu* are related to understandings about relationships, the individual's relationship with the wider community being one of them. Nedelsky sees rights as being about relationships and stemming from relationships. Her assertion is that we use rights language to capture values that stem from relationships and she emphasises the importance of understanding these relationships in order for us to better understand the rights.²⁵⁹ What is the relationship that underlies the understandings of how independence and community intersect? Independence or self-sufficiency as discussed above is by no means a right, but it does stem from a certain set of values and those values stem from relationships that recognise interdependence.

Nedelsky's re-conception of autonomy provides an interesting lens through which to view these statements and the understandings that they reveal. Her re-conceived notion of autonomy involves viewing relationships and therefore dependence as central to autonomy.²⁶⁰ She describes how relationships are key to allowing the development of autonomy and while she refers to parent-child relationships and state-citizen relationships, it could be argued that the relationship between a citizen and their community (both at the level of family and wider) has a role to play in providing the support, security and other elements needed to foster the development

²⁵⁸ Jennifer Nedelsky 'Reconceiving Rights as Relationship' (1993) 1 *Review of Constitutional Studies* 1.

²⁵⁹ Nedelsky note 258 above at 10.

²⁶⁰ Jennifer Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7 at 9 – 10.

of autonomy.²⁶¹ There is resonance between the idea of the individual's existence being dependent upon the existence of the collective and Nedelsky's statement: 'What makes autonomy possible is not separation, but relationship.'²⁶²

Rights have been perceived of, in western legal scholarship, as individualistic with no real recognition of the ways in which our interdependence influences and shapes the content of our values, thereby shaping rights.²⁶³ Nedelsky re-interprets autonomy in a way that foregrounds *both* the individual and collective elements. She goes on to assert that law assumes that autonomy is independence and that it is those assumptions that underpin our understandings of rights.²⁶⁴ This is what she believes needs to be challenged:

...the prevailing Anglo – American conception of law and rights rests so heavily on underlying conceptions of self and autonomy, there must be corresponding changes in the understanding of law and rights. Law makes assumptions about the sort of independence and responsibility that characterize mature human beings...So if rights are based on such a faulty conception of autonomy as independence, they are not likely to do a good job of facilitating the relationships that actually foster autonomy.²⁶⁵

The nuanced understanding of the relationship between the community and the individual fits into Nedelsky's re-interpretation of autonomy and her conception of rights as relationships. Her framing presents a useful way to understand how women in Cata and Rabula are articulating *ukuzimela* and what that articulation reveals about the relationships that ultimately underpin rights. Interestingly Nedelsky's paradigm is not only applicable to recent, post-apartheid understandings of land rights. It is in fact reflected even in the legal interpretations of our past. Apartheid framings of customary rights to land were about forcing the very assumptions of autonomy as independence into customary tenure systems. They were also about breaking up the relationships that Nedelsky identifies as fostering autonomy. All of

²⁶¹ Nedelsky note 260 above at 12.

²⁶² Nedelsky note 258 above at 8.

²⁶³ Nedelsky note 260 above at 7 – 8.

²⁶⁴ Jennifer Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and Law* (2011) 5.

²⁶⁵ Nedelsky note 264 above at 5.

this was part of depriving black individuals of the opportunity and ability to become a full person (*umntu*) and take their place among other people (*abantu*).

Independence, Being Dignified and Status

As discussed in the earlier chapters, the relationship between land rights and status is one that has always been significant. The colonial and apartheid state directed this relationship by using law as a tool of dispossession. As the post-apartheid state seeks to correct this, references to status and dignity by some of the women I interviewed is of particular interest to me. My question on this issue was framed around the connection between being married and that of affording one a dignified status. In the discussion I was interested in how the women articulated their status, markers of their status, and changes in their status.²⁶⁶

Interviewer: My question may be slightly off topic, but growing up some of us were told that in order for you to gain isidima (a dignified status)²⁶⁷ you needed to be married and that if you were not married you would not have isidima. We were told that establishing a home and having children while unmarried meant you would lose your status. Do you think that the desire for isidima, that being married brings, could drive people to get married?

Ms. M: No, it should not drive you to get married. You create your own isidima, even though I am not married, no one will enter my yard and do as they please. I have status in my house and people know it. In fact, many people think I have a gun, I don't have a gun it's just the way that I carry myself. I put up a brave front and act like a man even though I am not one, because I don't want anyone who will cause trouble inside my yard. So for example if I send one of the children to the shop and they come back and say: "Someone wanted to take my money but then they saw me and they said 'Oh you are Ms. M's child, no go I won't mess with you'". I say to my children don't

²⁶⁶ Gemma Wright, Michael Noble, Phakama Ntshongwana, David Neves and Helen Barnes 'The Role of Social Security in Respecting and Protecting the Dignity of Lone Mothers in South Africa' (2014) *Final Report* 70 – 83 and Gemma Wright, Michael Noble and Phakama Ntshongwana 'The impact of poverty and inequality on the dignity of lone mothers in South Africa' (2014) *Themed Working Paper 2*.

²⁶⁷ Note: the isiXhosa word isidima to mean status as ones standing within the community but it can also be used to describe a dignified person/ a person who has dignity – I use it in both meanings.

worry about them; they all think I have a gun, I'll shoot them. In reality I am just putting on a brave face, putting on an intimidating front.

There is an interesting intersection between independence and a dignified status. Although only one of the women interviewed spoke directly about *isidima* her response is important, as it speaks to her particular conceptions of a dignified status and pushes back against the ways in which black women's status was manipulated historically. Ms. M speaks about status in two ways – she speaks about status being self-created and internally defined. She also speaks about it as externally perceived and as something that people external to her recognise and shape. She seems to speak about the fact that her immediate community thinks that she has a gun as a symbolic part of how they create and underscore her having status.

Ms. M's statement that one creates one's own status overlaps with the concept of *ukuzimela* and the idea of being self-sufficient. As an independent woman your reliance is on yourself, to create your own dignified status. Women are in a position to play a role in shaping their own sense of worth. There are numerous factors that contribute to a woman's ability to do this for herself, including factors like financial independence, the community's response to her, and the ability to realise and access her most basic rights.²⁶⁸ The other side of this coin is the fact that the ability to be independent contributes to a woman's dignity both in how she sees herself, as well as how she is perceived by outsiders or members of the community. The two sides of this coin are that being independent gives you a say in establishing your sense of dignity and that being dignified contributes positively to the 'acceptability' of a woman's independence. The two are intertwined and operate in partnership with one another. It can be said that independence is part of how dignity is conceived and in turn dignity is a key part of what it means to be independent. To be independent is a part of being dignified and having status, and is for Ms. M valued and desirable.

What Ms. M is able to create and claim for herself with regards to her status is important, and I interpret it as a symbolic and real reclaiming of what women before her had lost. What is noteworthy is the example Ms. M chose to describe her

²⁶⁸ Gemma Wright, Michael Noble, Phakama Ntshongwana, David Neves and Helen Barnes 'The Role of Social Security in Respecting and Protecting the Dignity of Lone Mothers in South Africa' (2014) *Final Report* 70 – 83.

dignified status. What is noteworthy in the example is not the reference to the rumour that she has a gun, but rather the rumour as symbolic of the underlying belief that she is able to protect herself and her family. Community recognition of her status provides a certain type of protection and safety for her children. For her the fact that her children may escape harassment is related to the fact that members see her as having a dignified status. This presents insights and raises questions about how the ability to have a residential plot of land of her own enables Ms. M (and others) to express status. Something of what having land enables also comes through in Mrs. G's response below. In the main it is the pride with which she spoke about her ability to plant and have a garden that earmarks this response as being an indicator of what becomes possible when one has land.

Mrs. G: The thing that I copied (from others in the village) was ukulima (planting crops/ gardening) I copied that from others in the village. I told myself that I should also have a garden even though the money I was making on the forestry project was not a lot. But God made it possible for me to scrape together to get the building materials and with the garden I told myself that I would be able to do it. I planted it with my own two hands because when I got there it was just wild grass and weeds. So I hoed the soil myself pulling out the grass and weeds and throwing it to one side and leaving the soil. Then I'd plant in that little area. Then I would see that I wanted my garden to be bigger so I would plough another portion. Today I have a garden that is large, the one thing that I saw others in the village had and that I desired was a garden, which I made with my own two hands.

The responses from the interviews indicate the manner in which women in Cata and Rabula draw on the network of relationships and values that underpin land right in rural communities. The immediacy of the problems that they face and their concerns give a sense of the values that shape how they navigate framing and claiming their land rights.

Enduring repertoires and legibility

The interview that I did with the two men from the Cata Communal Property Association (CPA) detailed the processes that the CPA uses in making determinations about allocations of sites to those who request them, including single

women. This interview gave a small insight into the views and considerations of the other side of the individual/ community equation. The extract from the interview that appears below points to the type of relationship dynamics with which the members of the CPA, as representatives of part of the community, concern themselves. While by no means exhaustive, Mr. G's responses foreground taking time to determine an individual's intentions before assisting them with securing their rights and the individual displaying behaviour that is considered acceptable and does not disrupt the idea of social harmony.

Interviewer: You had mentioned earlier that once someone has come to you and asked for a site and you have reported to the other Chairpersons and the sibonda (headman) that they want to live here, you help them to get a title. How do you do that?

Mr. G: After some time once they have established their home and we have seen what type of person they are, we will help them to secure their rights.

Interviewer: So you wait for them to build first so that you have a sense of what type of person they are, then you advise them as to where to go to get a title.

Both men: Yes, that's right.

Interviewer: You mentioned that young unmarried men are not encouraged to get sites of their own. What is the reason for this?

Mr. G: It's not to say that we would not allow them a site under certain circumstances, but it is not something that we encourage. We are wary of giving them a place only to find that their intention is to make that place into a place for drinking and smoking and unconstructive behaviour. So we are wary of this behaviour from young men, because it causes problems.

While Mr. G certainly did not openly state or allude to this in his responses, I couldn't help but wonder about and be interested in the extent to which his response about not encouraging single young men to seek sites for themselves reinforced gender

roles.²⁶⁹ To my mind what remains unarticulated but present in his response is the idea (or assumption even) that women are inclined, possibly designed, to be homemakers. Unruly, disruptive behaviour is the terrain of young men, which seems to imply that it is not the terrain of young women. This present, but unspoken, idea about the nature of a woman's role is interesting because it points to the fact that, while practices may change and be submerged and then re-emerge, what endures is a certain ideal about a woman's role.

Thinking about the unspoken articulation in Mr. G's response made me draw connections with Mrs. M's response to the question about the term and concept of *idikazi*. This is the term used to describe an unmarried woman who has borne children, usually while still living in her parents' home.

Interviewer: To your knowledge in the generations of your grandparents did this practice of women getting sites exist? The research we've looked at mentions the 'idikazi' a woman with children who chooses not to marry and establishes her own homestead. Is this concept familiar to you?

Mrs. M: It is, in fact we will be attending a traditional ceremony at the home of just such an idikazi. She is a young woman who had children and chose to leave her parents' home and go establish her own. Her house is over there. She was never a wife but she carries herself in the way of a wife. She has built her home and now she will open the home and slaughter a goat and declare that this is her home. Once she opens the homestead we will go with gifts and things. We encourage this. She never married but she had children. Now the children will use her surname not the surnames of their various fathers or even if they all have one father they will not use the surname of their father because their father never married their mother.

What made me draw connections between the two responses was the way in which the description of the *idikazi* given by Mrs. M also fits into this paradigm of women as 'homemakers'. To what extent does the fact that the type of *idikazi* described by Mrs. M align to gendered norms, and inform the endurance of this term. If *amadikazi*

²⁶⁹ I am mindful of the fact that I was asking specifically about women and that this would have directed his answer. I also did not interrogate this point with him or with any of the women that I spoke to.

behaved differently or in a manner that fell outside of this paradigm what would this mean for the endurance of such a term? This speaks to the idea of enduring repertoires and perhaps sharpens the fact that what actually endures are the ideals and values that lie beneath the term. This allows for the resurgence of the use of the term to describe something that matches the ideals and values that have always underpinned the term. Interestingly before doing this fieldwork I had only ever heard the term *idikazi* used to describe women who were considered to have brought shame to their families for having children out of wedlock. I had only heard the term used in this way by the older members of my extended family, something that I suspect is influenced by their Christian values.

Some of the women in the focus group spoke about how single women had always had the ability to make claims that would allow them to stand on their own. One of the women referred to the size of the plots of old as something that allowed women to be given land of their own to establish their homesteads. These responses gesture towards the endurance of practices and their submergence and resurgence over time.

Woman 1 in the focus group: In the first instance an unmarried / single women (person) who wanted to establish themselves independently (ukuzimela) had the right to do so. They had the right to go and establish themselves.

Woman 3 in the focus group: Yes, exactly...so in that one homestead/ on that one piece of land your father could say: you see my child now that you have children of your own build yourself a home over there. On this same plot. You were not allocated land per se you were given land and space on this same plot. The difference was that the plots of old were large which is what made this possible.

Celestine Nyamu-Musembi writes about 'relative insecurity', something she describes as a person's (often woman's) relatively weaker ability to mobilise social support for their claim to property and which refers specifically to their position in the

property-holding entity, which may be family or kin.²⁷⁰ The single women I interviewed have successfully been able to leverage and take advantage of the spaces that opened up. They have had sites allocated to them and have managed to influence the land-holding entities' thinking about their position within it. In this way they have impacted upon their ability to mobilise social support for their claim and eventually improved their position of relative insecurity. Of course, this does not erase the role of the external factors at play here both within the community and the wider political arena, particularly the transition to democracy.

In this situation the land-holding entity is wider than the family or kin in that it is the community (more specifically the Cata CPA). But even at this level these women have managed to attain a strong enough position in the land-holding entity (the community) to garner social support for their claim, and I would contend that they have used both independence (or the aspiration of independence) and the notion of enduring ideals to do so. Both Mrs. G and Ms. M had a measure of financial independence with Mrs. G having worked in the forestry project and saved some money and Ms. M having an income generated from her work as a security guard. They, along with the others, aspired to be independent in order to take care of themselves and their children without being a burden to others and to escape from tense family relationships.

Conclusion

In their own way these discussions of the interviews bring me back to the question of legibility. The discussion in the literature review and the laws and policies chapters engaged with the idea of what was or is legible to the legal systems of the past and present. The endurance of certain ideas and language regarding the role of women speaks to social legibility, community values and what behaviour a particular community can read, understand and accept. It would appear that for these women in the Cata and Rabula area the idea of women as homemakers (regardless of marital status), coupled with the communities' understanding of the relationship between the individual and the community has worked in the favour of the women I

²⁷⁰ Celestine Nyamu-Musembi 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' (2007) 28 8 *Third World Quarterly* 1457.

spoke to. The preconceived, gendered roles are not unique to these areas and are a part of all societies whether rural or urban. However, being cognisant of them is a crucial, especially where legal interventions have the potential to crystallise certain norms. While these normative roles may make positive outcomes more possible here and now, we must be mindful that they also have the potential to entrench their own forms of exclusion.

Writing about women and tenure, Cross and Friedman explain that 'tenure is best understood as a social and political process rather than a system of laws or rules.'²⁷¹ Such an understanding of tenure is a central part of understanding why these enduring terms and ideals matter. Their endurance is related to the social recognition of the claims to land that these and other women make. Tenure as a social process encapsulates the relationship between the framing of claims made by an individual and the manner in which they are read by the wider group. The rights in land that these women are laying claim to are intimately connected with their membership in the community, because these rights arise out of their relationships with their family and the community. If rights are socially recognised claims then their social recognition and the affirmation of their existence is dependent upon the community.

The conception of tenure held by the land administration structure (the CPA) foregrounds the social element of tenure in ways that have provided a space for single women, and that align with women's lived realities. There is a relationship between what the women desire for themselves and what the communal land administration structure (and possibly the wider community) find legible. Legal interventions must step into this dynamic, shifting relationship and attempt to entrench and enable the positive developments.

²⁷¹ Catherine Cross and Michelle Friedman 'Women and tenure: marginality and the left-hand power' in Shamim Meer (ed) *Women, Land and Authority* (1997) Ch. 1 at 17.

Chapter Six

Overarching Analysis

Introduction

This chapter draws together aspects of the discussions on the legal framework and the empirical research on issues of land rights and relations within customary systems. The discussion centres on unpacking the differences in understandings of tenure security and customary land rights and the implications of these understandings for rural women. Whereas the preceding chapters on the legal framework and the empirical research have set out the context this discussion seeks to speak across both of those chapters. The first section engages with how framings and models centred on formalisation close off possibilities and don't take full account of rural women's realities. The discussion then turns to a closer look at what the laws and policies say about the state's understanding and approach. The final point of discussion is the implications of these understandings for rural women, and what the state approaches and framings, in particular, could mean for their lived realities.

In the main, experiences of formalisation seem to be about securing an aspect of people's rights to land.²⁷² In the models adopted by the South African Department of Rural Development and Land Reform, the approach often secures an aspect of the person – either as an individual with certain rights or as part of a pre-determined community. For black women, in particular, approaches to securing land rights should be intimately intertwined with the restoration of their status on their own terms. Given the cross-cutting ways in which the status of black women was diminished through the legal tools available to colonialism and apartheid, and how that intersected with the framing of their land rights and relations, redress needs to be implemented in a cross-cutting manner too.

²⁷² Ingrid Yngstrom 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate over Land Policy and Changing Tenure Systems' (2002) 30 *Oxford Development Studies* 21 and Ruth Meinzen-Dick and Esther Mwangi 'Cutting the web of interests: Pitfalls of formalizing property rights' (2008) 26 *Land Use Policy* 36.

Framing Land Rights and Relations: rights claimed across spaces

Formalisation is mainly about demarcating spaces and delineating the extent of what one can claim or the reach of one's rights. Formalisation relies, in part, on the physical marking out of space and couples that with the marking, in legally legible terms, of the rights (and responsibilities) that accompany the physical space. On the other hand, the evidence, in the form of empirical research by anthropologists, historians and other scholars points to women claiming and framing their land rights in ways that cut across spaces.²⁷³ While formalisation determines and distinguishes rights and the scope, terms and basis of claims, the actions of women in rural communities appear to reach out and span what 'formally' appear to be separate spaces. Where traditional conceptions and tools of formalisation (such as title deeds) distinguish between the differing nature of rights, ie, ownership as opposed to use rights, the claims that women are making appear to knit together rights derived from a variety of roles. In some instances, claims combine rights on the basis of being both an autonomous individual but also a member of a group, thereby sliding across spaces.

A discussion of land rights, and mechanisms for securing such rights, which takes into account the reality that these rights are claimed at the intersections and interfaces, acknowledges a certain fluidity. It acknowledges that women are not always claiming one form of land right on the basis of one type of relationship. Women are not only sisters looking to assert their claims to equal ownership of a family home, they are not only widows seeking to secure their ownership of a deceased husband's fields. This may seem self-evident, but the proposed legislative interventions do not appear to provide space for this reality. The proposed Communal Land Tenure Bill offers only the possibility of title being registered for an individual or the community. Were this to become law it would enshrine an assumption that title is what is best in all cases for a woman looking to secure her tenure rights. Being able to claim rights to land across spaces can provide women with a tool with which they can negotiate and navigate. A sister looking to assert a claim to ownership may, in the interests of family relationships, assert a claim to

²⁷³ Aninka Claassens and Sindiso Mnsisi Weeks 'Rural Women Redefining Land Rights in the context of Living Customary Law' (2009) 25 *South African Journal of Human Rights* 491 at 500.

certain rights on the basis of being part of the family. She may also claim other rights on the basis of being a member of the broader community. Current legislative proposals present one model, a model that is steeped in and reflects the ways in which formalisation seeks to define and delineate. By centring one particular form of land right through one legal instrument, the model in the draft CLTB 2017 restricts the ability of women to find protection for claims that span spaces.

Discussing land rights in ways that acknowledge the existence of fluidity and that this fluidity can at times be a tool or even a strategy offers a particular challenge for securing such rights. The means of securing women's rights to land require mechanisms that acknowledge this fluidity and make it possible. The possibility of claiming rights across roles and relationships should remain available. It does not preclude security, rather it requires a more flexible conception of security. It aligns itself with the manner in which women, and all people, move between spaces making claims to various rights on the basis of different relationships. The Constitution does not bind the state to using only Acts of Parliament in the realisation of land reform.²⁷⁴ If legislation does not lend itself to such nuances then perhaps we ought to consider other means.

Framing Land Rights and Relations: the State's approach

The South African government's current approach to securing tenure in rural areas where land is held communally, appears to be premised on a particular understanding of the relationship that communities – and individuals – have with their land. Aspects of this understanding lead the state to a particular framing or framings of land tenure rights under customary systems. This framing is arguably informed by particular views on and understandings of customary laws and tenure systems, ideas about tenure security, interpretations of the Constitution, and of law as an instrument for effecting social change. A close reading of the laws and policies promulgated by the Department of Rural Development and Land Reform, which is responsible for securing tenure for millions of rural South Africans, points to particular understandings, some of which are unpacked below.

²⁷⁴ Constitution of Republic of South Africa, 1996 section 25(5) requires the state to take "reasonable legislative and other measures" to facilitate conditions for equitable access to land.

Customary tenure systems

Recent attempts at drafting legislation aimed at providing secure tenure to South Africans living on land held in terms of a system of communal tenure, has provided evidence of how the Department is choosing to understand the term 'communal' and the relationship between the collective and the individual. This understanding is also closely linked to how the Department conceptualises the role of traditional leaders. It is apparent in the model envisaged in the Communal Land Tenure Policy of 2014, that in the view of the government the rights of the collective supersede those of the individual. The strongest, most complete right in the form of title is in the name of the structure representing the community. The lesser rights held by households and potentially by individuals within those households can potentially be superseded by the overarching right.²⁷⁵ This formulation aligns with use of the term 'communal' to obscure all other rights. It fudges a variety of rights on communal land into one homogenous ideal that is peacefully administered in favour of all. This narrative is continued in and supported by the role that the proposed legislation envisages and proposes for the institutions of traditional leadership. There is seemingly an acceptance by the state that traditional leaders (and their councils) are the true representatives of communities, and in fact in some quarters this stretches to traditional leaders being the 'rightful' owners of land.²⁷⁶ This acceptance permeates the legislation and the land-holding and administration models proposed in it. The most recent legislative interventions do not reflect the reality of a nuanced relationship between the individual and the collective when it comes to customary land rights and systems.²⁷⁷ Instead these interventions have the potential to set up a competitive binary that pits the rights and security of the individual against those of the community.

²⁷⁵ Tara Weinberg, *The Contested Status of Communal Land Tenure in South Africa*, PLAAS Rural Status Report 3 (2015).

²⁷⁶ Thiyane Duda 'Communal land belongs to the people, not to the chiefs' 5 April 2017 *Daily Maverick* available here: <https://www.dailymaverick.co.za/article/2017-04-05-op-ed-communal-land-belongs-to-the-people-not-to-the-chiefs/#.Wk4tCXmYPIU> accessed on 3 January 2018.

Anthea Jeffery 'Zuma's land grab urges to traditional chiefs; desperate move by a declining force' 18 March 2015 *Fin24* available here: <https://www.fin24.com/BizNews/Zumas-land-grab-urging-to-traditional-chiefs-desperate-move-by-a-declining-force-20150318> accessed on 3 January 2018.

²⁷⁷ Ben Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Act* (2008) 112.

Conceptions of tenure security

In the same way that the recognition and therefore security of traditional leadership positions rests with the state so too with tenure security.²⁷⁸ The legislative interventions are intent on making tenure security legible to and wholly reliant on the state. There is an assumption here that the state is always best placed to offer accessible and fair protection of people's land rights, which is not always the case, not least because state mechanisms can be cumbersome and slow. In addition to this assumption of accessibility and benevolence, there is an apparent tension between the state seeming to want to give people security as an important part of developing rural areas. Yet at the same time there is the adoption of a certain paternalism towards rural people, as evidenced in the Department's concerns that people will use their title deeds as security when entering into debt and upon defaulting on that debt, they will then lose their homes.²⁷⁹ While this fear is not wholly unfounded it does make unfair and untested assumptions about rural people.

Interpretations of the Constitution

There is clear evidence that the constitutional directive to secure the tenure of those whose tenure is insecure as a result of discrimination, remains only partially fulfilled with respect to people living in the former Bantustans.²⁸⁰ There is undoubtedly an urgent need for the state to complete the process of fulfilling this instruction. However, in working to comply with this constitutional directive the state must not infringe on the other constitutionally protected rights of rural people. A look at the most recent legislative attempts at fully meeting the directive in subsections 25(6) and (9) raises questions as to whether the state does in fact run the risk of infringing on the rights of rural people in respect of sections 30 and 31 of the Bill of Rights.²⁸¹

²⁷⁸ Chapter 3 of the TLGFA houses the provisions dealing with the recognition of the traditional leaders these sections of the Act place the recognition of various positions of traditional leadership in the hands of the President or Premier.

²⁷⁹ 'Minister Gugile Nkwinti addresses land tenure security conference' 30 June 2017 available here: <http://www.sacau.org/blog/2017/06/30/minister-gugile-nkwinti-addresses-land-tenure-security-conference/> accessed on 4 November 2017.

²⁸⁰ Legislation that has been passed in accordance with section 25(6) includes: IPILRA – an interim measure applicable to rural people and ESTA – which is applicable to occupiers of the land as opposed to people who hold customary rights in the land that are equivalent to ownership.

²⁸¹ Section 30: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights. Section 31: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

Section 30 of the Constitution enshrines the right of people living in rural South Africa to ‘participate in the cultural life of their choice’ as long as they do so in manner that is consistent with the Constitution. For those people living under the authority or jurisdiction of traditional authorities – whether or not they affiliate to them – this right risks being infringed upon by a model of land administration and tenure security that relies predominantly on the structures of traditional authority. Members of rural communities may be happy to live under a system of customary law and may indeed choose to do so. However, the centralisation of traditional authorities in systems of customary land rights, and the automatic application of this formulation deprives people of being able to fully exercise the choices provided for in section 30 and intrinsic to their lived realities.²⁸²

In respect of section 31 the rights of cultural, linguistic and religious communities clearly include the right ‘to enjoy their culture’. Land rights systems and land relations fall firmly within the understanding of what constitutes a culture. These systems are often times shaped around particular world views that are shared amongst a group of people. It is not unreasonable therefore to argue that the drafting of legislative interventions around land rights that depart from customs, cultural practices and understandings of a particular culture is problematic. It is especially problematic when those legislative interventions are designed to protect the land rights of that group(s) but are applied as a standard across cultures and also provide no space for culture-specific adaptations. Having an imposed land governance system that does not align with cultural understandings of land rights, hinders the ability to fully enjoy your culture. By providing communities with potentially poor land administration choices, the state is not providing the most enabling conditions for communities to enjoy these rights and freedoms.

(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

²⁸² Sindiso Mnisi Weeks and Aninka Claassens ‘Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them’ (2011) 22 *Stellenbosch Law Review* 823.

Another section of the Constitution that warrants discussion here is section 211(1).²⁸³ This section provides for the recognition of ‘the institution, status and role of traditional leadership’; importantly it does so ‘according to customary law’. This provision of the Constitution locates the recognition of the institution, status and role of traditional leadership firmly within a customary law understanding of the institution, status and role. The relevance of this particular articulation for land rights is in the fact that the ‘role of traditional leadership’ in particular is also recognised in accordance with customary law. The legislative interventions point to the state developing a role for traditional leaders that is not evidently aligned or steeped in rural communities’ understandings of customary law.²⁸⁴

The relevance of this analysis for women, in particular, is that the connection of the recognition of traditional leadership and customary law, along with other constitutional provisions, forms a basis upon which rural women can argue that traditional leaders’ conduct towards them should be informed by a constitutionally compliant customary law. This makes the surfacing of evidence about women’s rights to land and the various ways in which these are included in customary land rights systems vital.

Law as an instrument

Although the Constitution makes it clear that securing the tenure of rural South Africans requires passing legislation, it certainly does not preclude the state from coupling legislation with other mechanisms. Given that the progress in securing people’s tenure rights in law remains incomplete in so far as rural South Africans are concerned, there is undoubtedly an urgency around passing the required law. However, it could be argued that given the understanding that the state appears to have about the law as an instrument for securing land rights, such legislation will not hold all the answers. This is because the proposed laws reveal that drafters have shown insufficient cognisance of the reality into which these laws will be inserted. Law is not a wholly neutral instrument; it is shaped by dominant interests and, in

²⁸³ Section 211(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

²⁸⁴ Land and Accountability Research Centre ‘Submission on the Traditional and Khoi-San Leadership Bill, 2015’ available here: http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf accessed on 22 July 2017.

South Africa, by the Constitution.²⁸⁵ Take for example the model proposed by the Communal Land Tenure Policy, which was designed around giving the title to traditional authorities. The Communal Land Tenure Bill is modelled around registered title for community and individuals and an administrative role for traditional councils. These models are proposed despite the widespread instances of traditional leaders and their councils acting in ways that undermine people's customary land rights and wishes. Yet the Department has drafted legislation in a way that does not build in realistic and accessible safe guards.

Framing Land Rights and Relations: the implications of the State's approach for rural women

The reform, in respect of land rights, that the Constitution envisages for South Africa has unfortunately been poorly implemented by the state. In spite of a detailed design, concerns are rife from many quarters, including rural communities, civil society and academics, that all of the various elements of the land reform programme are in trouble.²⁸⁶ Ordinary South Africans bemoan the slow pace of change in relation to land ownership. Rural communities continue to live under insecure tenure arrangements which they are forced to defend against a range of threats including certain traditional elites, large mining companies and in some cases dispossession disguised as development. What does this context of ill-conceived legislative interventions and a troubled land reform system mean for the access and tenure security of women living in rural areas?

Models that replicate past approaches

The proposed model for securing land rights in the former Bantustans is one that contains echoes of the approaches and framings of the past. Two aspects of this model are troublesome for women living in rural South Africa. The first is that the proposed legislative interventions do not fully acknowledge the strength of women's customary rights. The model gives dominance to the rights of the title holder whose

²⁸⁵ Section 2 Constitution of Republic of South Africa, 1996.

²⁸⁶ Ruth Hall & Thembela Kepe 'Elite capture and state neglect: new evidence on South Africa's land reform' (2017) *Review of African Political Economy* 1, Ben Cousins 'Land reform in South Africa is in trouble – can it be saved?' 29 June 2016 *Daily Maverick* available here: <https://www.dailymaverick.co.za/article/2016-06-29-op-ed-land-reform-in-south-africa-is-in-trouble-can-it-be-saved/> accessed on 4 January 2018.

name is registered on the title deed, thereby rendering other rights as secondary rights. In its own way, the state could be accused of continuing the painful trend of finding women's rights under customary law illegible. This does not bode well for women because they are potentially then faced with the double challenge of working to provide evidence of their land rights within customary systems and then having to come up against a state whose legislative interventions do not recognise the strength of those rights. Along with other rural community members the range of women's customary land rights are reduced to a form of right that can always be superseded by the rights of the owner or title holder.

The second troubling element in this model is the role it provides for traditional leaders and traditional councils. By giving these structures responsibility for land administration in a rural area the proposed CLTB places considerable power in the hands of traditional authorities, while simultaneously shaping their relationships of accountability with the state and their communities. This too is an echo of a system rejected and defeated through the liberation struggle.²⁸⁷ There is inherent potential in this model for communities to feel that they are unable to hold their traditional leaders accountable, as the model places obstacles in the path of customary understandings of traditional leaders as custodians reliant on their ability to garner community support.²⁸⁸

For rural women the shifts in the relationships of accountability present the challenge of trying to assert and protect their rights either by relying on support from the community as holder of the title or the administrator (either a CPA or traditional council) or asserting them against these bodies. Admittedly it is not impossible that rural women may receive such support from these bodies, but in the event that they do not they are left vulnerable. They could rely on the community rules provided for in the CLTB should those be favourable.²⁸⁹ If they are not then their options for recourse are limited and are likely to lie outside the customary system, likely in the formal courts system raising issues of accessibility and affordability.

²⁸⁷ Albert Luthuli *Let my people go* (2006) and Govan Mbeki *The Peasant Revolt* (1964).

²⁸⁸ Land and Accountability Research Centre 'Submission on the Traditional and Khoi-San Leadership Bill, 2015' available here:

http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20OTKLB_LARC_20160202.pdf accessed on 22 July 2017.

²⁸⁹ Clause 26 of CLTB 2017.

Laws that are insensitive to power dynamics

The legacy of colonialism and apartheid has significantly shaped the power dynamics at play within the former bantustans. These areas are mired in deep poverty and inequality and yet currently, ironically, they are also being discovered to be areas rich in mineral resources.²⁹⁰ This has led to a wave of mining-related activities and development taking place in these areas. The reality is that in many instances communities are not consulted or informed of these developments.²⁹¹ The consequence of this situation is that where the proposed mining or other developments threaten their land rights communities find themselves having to push back and challenge large corporations.²⁹² In some instances, the impending development has been sanctioned (without community knowledge or despite community objections) by the community's traditional authority.²⁹³

In a context of such dire poverty the promises of jobs and services that accompany development projects are desperately needed and sometimes fiercely defended. The result is that it presents the possibility of pitting community members against one another. Those wanting to defend their generational land rights are seen as opponents to development and the improved quality of life that it promises.²⁹⁴ Sometimes it is not just certain sections of the community with a vested interest in defending these arrangements, but also the traditional elite who are offered black economic empowerment partnerships in these development projects.²⁹⁵ All of this sets up difficult and sometimes dangerous dynamics within which women are expected to assert their land rights.

²⁹⁰ Sonwabile Mnwana 'Custom' and fractured 'community': mining, property disputes and law on the platinum belt, South Africa' (2016) 1 *Third World Thematics* 218, Joanna Pickering and Thabiso Nyapisi 'A community left in the dark: the case of Mapela, Struggles for transparency and accountability in South Africa's Platinum Belt' (2015) 2nd edition *In Good Company* 27.

²⁹¹ Land and Accountability Research Centre 'They are Robbing Us: How Mining is Affecting the Residents of Makhasaneni' (2016) *People's Law Journal* 62.

²⁹² Joanna Pickering and Thabiso Nyapisi 'A community left in the dark: the case of Mapela, Struggles for transparency and accountability in South Africa's Platinum Belt' (2015) 2nd edition *In Good Company* 27.

²⁹³ Note 291 above.

²⁹⁴ Greg Nicholson 'Goodbye Bazooka: Wild Coast anti-mining activist killed' 24 March 2016 *Daily Maverick* available here: <https://www.dailymaverick.co.za/article/2016-03-24-goodbye-bazooka-wild-coast-anti-mining-activist-killed/#.Wk5E0HmYPIU> accessed on 4 January 2018.

²⁹⁵ Aninka Claassens and Boitumelo Matlala 'Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires' (2014) 4 *New South African Law Review* 117.

The centralisation of land administration powers in one ultimate body, whether the traditional council or a Communal Property Association (CPA), as proposed by the CLTB takes place in a context where the voice of women is frequently missing. Women are either absent from the structures being empowered, or not heard when they do speak. The case of traditional councils is one such example. As has been stated, the Traditional Leadership and Governance Framework Act requires that these structures meet certain composition requirements that relate specifically to women.²⁹⁶ Research has raised doubts as to whether and how many councils have met these requirements.²⁹⁷ This raises questions about the representivity of these structures and possibly even questions about their commitment to representivity if they have been unable to reach the minimum threshold set in law. CPAs also face somewhat similar challenges; without sufficient support these structures can also be weak in their representivity.²⁹⁸ This again places women in a position where they are asserting and protecting land rights in challenging spaces that either shut them out completely or reluctantly and partially include them.²⁹⁹

The Interim Protection of Informal Land Rights Act potentially has scope for better protections for the land rights of rural women. The Act's conscious mechanism for protecting individual rights within the context of community rights is a positive aspect. Where there are community led, constitutionally compliant developments in custom and usage as they relate to women's land rights, then the IPILRA formulation carries great potential.³⁰⁰ Legislative interventions guided by IPILRA as a starting point could

²⁹⁶ Section 3 of the TLGFA lays out the composition requirements for traditional councils. It stipulates that one third of the membership of traditional councils must be women.

²⁹⁷ Land and Accountability Research Centre 'Submission on the Traditional Leadership and Governance Framework Amendment Bill, 2017' available here: http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission_TLGFA%20Amendment_LARC_20170605%20Final.pdf accessed on 4 November 2017.

²⁹⁸ Centre for Law and Society Factsheet on Communal Property Associations February 2015 available here: http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CPAs_Final_Feb2015.pdf accessed on 4 January 2018.

²⁹⁹ Stombi Hlombe's experience of harassment as a member of a traditional council is recounted in this news story: Pearlie Joubert 'Womens Minister whacks Chiefs Bill' 22 September *City Press* available here: <https://www.news24.com/Archives/City-Press/Womens-minister-whacks-chiefs-bill-20150430> accessed on 4 November 2017.

³⁰⁰ Sections 2, 3 and 4 of IPILRA provide that where land is held on a communal basis a person may only be deprived of their land rights in accordance with the community customs and usage and that appropriate compensation shall be paid to that person. It also provides that part of the customs and usage are that decisions for such deprivation be taken by a majority of holders of such rights.

create the space for a far more constructive and promising dialogue on how to secure the land rights of South African women living in the former bantustans.

Conclusion

The various strands of framing that are engaged with in this chapter begin to tease out some of the more difficult aspects of using law and policy to navigate human relations and ways of being in the world. Based on my analysis, the approach taken by the state, as gleaned from the proposed policy and legislative interventions, presents challenges for women living in rural communities. Not least of these is that they have the potential to be exclusionary, to exclude women's voices, and to exclude other interpretations, framings and articulations. This potential for exclusion not only mimics some of the worst elements of South Africa's past, especially in the context of land rights. It also denies the reality that women struggle for their tenure security rights at the interface of multiple spaces. They struggle at and reach across these intersections as they navigate the framing of their claims and the assertion of their rights. Claims span across the realm of custom and the Constitution, they reach across individual interests and wider relationships and in their own way they imperfectly weave together kin and community. In a rather stark way this reality makes it clear that for legislation and policy to sensitively navigate and meaningfully intervene here, it cannot adopt models built on assumptions and exclusions.

It can hardly be beneficial for rural women to be forced into making either/or choices. Rather they should have a spectrum of options. In some instances what is needed is a title deed, but in other instances what may be needed is mere recognition of a claim. Models that encapsulate real, thoughtful options, acknowledge that relationships are central to customary tenure systems. This is especially so because these systems are built on ideas of social tenure and the relationship that underpin that. Such a model would truly hold the potential to recognise on their own terms land and tenure rights held under customary systems. This would be important for women's land rights as it would depart from models and framings that push women into making either or choices. In reaching across spaces and relationships, women are modelling an approach to secure land tenure that law makers and others would do well to take notice of.

Chapter Seven

Concluding Remarks

In this thesis, I set out to discuss what the experiences of a small group of women, who had – exceptionally – gained access to land in an Eastern Cape community, can tell us about how they frame their claims to residential land. These discussions foregrounded the relationship between framing - specifically who frames rights to land and how they frame them – and what this means for the assigning of status in the context of women’s land rights. The preceding chapters looked at framing and status in South Africa’s colonial and apartheid past and in our democratic present. Engaging with framing and status in South Africa’s past, I explored the particular constructions and assumptions that were entrenched through law during this period. I sought to illustrate the historical weight and impact of framing in order to analyse current framings in a way that reflects on this weight and impact. In setting out to discuss framing and status in this way I reflected critically on law’s role in shaping narratives about people and in creating identities. The use of law in this way has had particular implications for the land rights of black women. It continues to have such implications because current framings have not yet sufficiently departed from entrenched narratives on black women’s status and relationship to land. The top-down framing of land rights and relations that is reflected in the recent laws and policies on communal land assigns to communities and the women within them the role of either an individual or a collective. This is as opposed to recognising that members of these communities occupy both roles. Juxtaposing this framing with how women in the former homelands navigate framing and status points to a degree of misalignment with the approach being proposed in legal instruments. The narrative that current legal interventions are providing about rural communities differs from the narrative that women weave through their lived experiences, shown through existing research.

In the opening chapters of this thesis I discussed the anthropological and ethnographic literature as well as selected land-related laws and policies, both past and present. This allowed me to place, side-by-side, the narratives and identities shaped by these legal interventions and the thinking that framed them. These narratives both shape and impact status, the laws (especially those underpinned by

racist framings) sought to actively alter status, particularly the status of black women. Together with the process of de-valuing and diminishing the legal status of black people's rights to land the legal interventions of the colonial and apartheid era diminished the social status of black women. Discussing some of the historical and current literature and laws highlights the cross-cutting ways in which status was undermined in relation to land rights. The discussions of the current laws and recent empirical literature question the extent to which current framings of land rights depart from the deeply problematic framings of the past. They also assess the extent to which framing and status resonate with community understandings. The central assertion in these discussions is that framing and status impact upon each other; determinations about the one enable and encourage determinations about the other.

Building on these discussions and in order to further explore the central assertion articulated above, I engaged with the interviews that I conducted with a small group of community members, mainly women, in Cata and Rabula in the Eastern Cape. Through these interviews I have begun to draw out the ways in which women's lived experiences, of on the ground 'changes' to women's access to land, is informed by how they navigate framing and status. Engaging with the insights from the women I spoke to, it became clear that their understandings of the relationship between an individual and a collective (mainly family) is a nuanced one. None of the women articulated a solely self-interested relationship, obtaining a plot in their own name was not only about or for themselves. The centrality of relationships, particularly family relationships was very evident, all of which points to a more relational/relationship-centred framing. When speaking about status the women spoke mostly about social status, perceptions of themselves and others within the community and in the family. This type of consideration of status resonates with a context in which framing leans towards being more relational and is centred less around exclusivity and absolute protection from interference. Two of the interviews foregrounded an interesting consideration about enduring terms and repertoires and the enduring ideals that underpin them. Considering the fact that in many ways framing is informed by ideals it is important to consider these ideals and what they say about what is determined to be legible. This is important because we must be cognisant of what it is that is being 'locked into law'.

The analysis chapter that follows juxtaposes the state's legal interventions with the data from the interviews conducted with women in a rural Eastern Cape community. This discussion articulates the dynamic approach to framing adopted by women and unravels the state's approach and the implications for rural women of the legal interventions shaped by this approach. Using the data from the interviews and other empirical work I have tried to illustrate how women are framing (and claiming) their rights in ways that reach across intersections. In contrast the state's approach appears to lean towards using law and legal interventions as a means to demarcate and separate out. Forcing either-or-styled choices and erecting seemingly impermeable boundaries in a context that requires both porousness and resistance. Given that the restorative element is key in the South African context it is important for law makers to be cognisant of what imposed delineation and separating out has done to customary tenure systems in the past. They should bear in mind the impact of demarcating and defining in a system of land rights in terms that are not of that system. Law makers should also take into account community-led developments and the lived realities of the members of those communities, rather than relying on formal notions of equality and the supposedly neutral assumptions that underpin law. This raises for law makers an indicator that, in a context where restoration is a priority, the responses and interventions that they craft require nuance and sensitivity.

On the basis of the discussions outlined in this thesis it has become clear to me that where women, together with their communities, frame claims for themselves in ways that are steeped in their social realities and lived experiences they define for themselves the relationship between framing and status. Previously the relationship was predominantly one of justification; where a certain framing justified assigning a certain status and vice versa. What I see developing from community-led initiatives is a relationship between the two that is less about framing as a tool for assigning status (as it was during our colonial and apartheid past where the relationship was centred on framing black people's rights claims as less than and subordinate to, thereby assigning to them the status of second-class citizens). What these women and their community develop is a relationship between framing and status that is centred on framing enabling a certain self-defined status. When framing is centred on what is important for the women in this community – the relationships and being able to protect and improve those – then they are able to obtain a status that reflects

what matters to them. Whether that is the ability *ukuzimela* (to be independent) or the knowledge that your children are not likely to be harassed on their way to the shops or that you too are able to grow and tend your own garden.

Paternal, centralised approaches to framing assign power to an elite group allowing determinations of status to be made for those who fall outside of the empowered group. For some rural South Africans, this dynamic plays out in two ways: firstly, in instances where traditional leaders make claims of being the owners of communal land. Such claims effectively assign to South Africans living in these communities the status of subjects of said traditional leader rather than full citizens. These claims make the land rights of community members subject to the overarching claim to ownership of the traditional leader. Secondly, it shows itself in the legal interventions proposed by the state, which favour a top-down approach to framing. This is evident in the fact that the proposed law prioritises the issuing of title (and the associated rights) and leaves the recognition of other rights to be developed through community rules, effectively leaving women to assert their rights in spaces that are not always easily navigable. In a context where framing has been used to diminish and to justify displacement, it really matters because of the overt and covert messaging that it sends about status. Approaches that do not fully re-imagine the type of narratives and identities that legal interventions can shape will always run the risk of failing rural women.

Acknowledging the role of framing and status is important in honouring the fact that tenure is a social and political process. There is of course also a two-way relationship between these two elements of tenure. The discussions in this thesis have foregrounded the social elements through the way in which considering framing and status forces us to engage with the relationships that underpin these concepts. For the women interviewed as part of this thesis framing their claims does not occur in a vacuum. Their considerations are rooted in the relationships that they hold dear and the means of maintaining or improving those. The state's current approach to securing tenure seeks to delineate in ways that fit uncomfortably with how the social processes of tenure play out in communities. The political elements have been explored through engagement with who is empowered to do the framing and the impact of that on the relationship between framing and status. Framing as led by women and their communities is held up alongside framing as done by the state

through its legislative interventions and policy proposals. Enabling top-down framing determined and influenced by elite groupings, whether state officials or traditional leaders, results in the development of tenure protections that will either lock women into binary choices or render them invisible.

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List of interviewees and details of interview:

Name of Participant:	Date of Interview:	Length of Interview:
1. Participant 1 (f)	22 April 2014	1 hour focus group
2. Participant 2 (f)	22 April 2014	1 hour focus group
3. Participant 3 (f)	22 April 2014	1 hour focus group
4. Participant 4 (f)	22 April 2014	1 hour focus group
5. Participant 5 (f)	22 April 2014	1 hour focus group
6. Participant 6 – Ms. M (f)	23 April 2014	1 hour individual interview
7. Participant 7 – Mrs. G (f)	23 April 2014	45 minute individual interview
8. Participant 8 – Mrs. H (f)	23 April 2014	40 minute individual interview
9. Participant 9 – Mr. M (m)	23 April 2014	1 hour 10 minute group interview
10. Participant 10 – Mr. G (m)	23 April 2014	1 hour 10 minute group interview
11. Participant 11 – Mrs. M (f)	24 April 2014	45 minute individual interview
12. Participant 12 – Mrs. P (f)	24 April 2014	40 minute individual interview